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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 171

MARY BELL KING, PETITIONER,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 3, 1947.

CERTIORARI GRANTED OCTOBER 13, 1947.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5559

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Appellant,

versus

MARY BELL KING, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville

Appendix

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law of the District Court, omitting the caption, follow:

In compliance with Rule 52 (a) of the Rules of Civil Procedure, I find the facts specially, and state my conclusions of law thereon, in the above cause, as follows:

FINDINGS OF FACT

I

The parties to the action stipulate and agree as follows:

"1. This stipulation sets forth all relevant facts upon which the issue involved herein is submitted to the Court for decision and judgment.

"2. Plaintiff is a resident of Spartanburg, South Carolina.

"3. The defendant is a Fraternal Benefit Association organized and maintained for the purpose, among other things, to 'establish funds to indemnify its members for disability or death resulting from accidental means'; incorporated under the laws of the State of Ohio, and licensed to do business as a fraternal benefit association in the State of South Carolina.

"4. On September 20, 1938, the defendant issued the deceased Drew Lagrone King, Certificate No. 276431-R hereto attached as Exhibit 'A' thereby certifying that he had been accepted as an insured member of said Order under Class 'A'. Said Certificate further provided that it, together with the application for insurance, constitution and by-laws and certain other papers not involved in this litigation, should constitute the contract between the parties. This contract was in force on February 9, 1943. The [fol. 2] papers and documents referred to in this paragraph may be handed to the Court by either party during the course of the trial.

"5. The portions of the defendant's constitution and by-laws relevant to this action are:

"(a) Article 15, Section 13, providing the indemnity of $5,000.00 in the event of death effected solely through external violent and accidental means.

"It is conceded that the deceased elected Option 2 with reference to the mode of settlement providing that the entire indemnity should be paid within ninety days from the receipt by the Supreme Executive Committee of satisfactory final proof of death. The plaintiff herein was the duly designated beneficiary, and if entitled to recover against the defendant, the amount of such recovery should be $5,000.00, with interest at six per cent (6%) from the twenty-fifth day of August, 1943, and costs.

"(b) Article 15, Section 16, which provides 'this Order shall not be liable to any person for any benefit for death resulting from participation, as a passenger or otherwise, in aviation or aeronautics (except as a fare-paying passenger in a licensed aircraft operated on a regular schedule * * *).'

"6. On February 9, 1943, the deceased, a Second Lieutenant in the Civil Air Patrol with Coastal Patrol No. 8, was stationed at James Island near Charleston, South Carolina. On the morning of February 9, 1943, at around 8 A. M. he left his base field as an observer in a land based plane piloted by a First Lieutenant, Clarence Rawls, on a routine coastal patrol flight. Included in the patrol was a second plane piloted by Lieutenant James A. Taylor with

[fol. 3] Lieutenant K. C. Bates as Observer. All of the above parties were members of the Civil Air Patrol.

"About 9:30 A. M. the plane occupied by Rawls and King developed motor trouble and was forced down on the Atlantic Ocean at about thirty miles out from Cape Fear, North Carolina.

"At around 9:33 A. M. Taylor and Bates observed the plane on the water, where it had apparently landed in a normal landing attitude. Both Rawls and King were out of the plane and in the water wearing inflated life jackets and neither seemed to Taylor or Bates to have been injured from the landing. Taylor and Bates circled them at an altitude of about fifty feet and could see both men signalling with their arms. They dropped them emergency kits containing whiskey and concentrates and radioed their situation and position to the base. The plane sank within about four minutes after being first observed on the water. Taylor and Bates went up to an altitude of about 500 to 600 feet so that they could keep King and Rawls in sight and continued to circle them for a period of two to two and one-half hours when a shortage of gasoline forced them to head for their base. During this period King was alive.

"The two men were picked up by a Navy boat about 2 P. M. both being dead at the time. The bodies were examined by Lieutenant Com. Landis C. Brown (a duly licensed and practicing physician in civil life) of the United States Navy at the Section Base Hospital of Fort Caswell at Southport, North Carolina. He found one or two slight stratches on Lieutenant King's body but found no marks severe enough to be called an injury or considered a contributory cause of death. His diagnosis as shown in the proof of death furnished by plaintiff to defendant, was 'Drowning as a result of exposure in the water after [fol. 4] failure of airplane motor'. Lt. Com. Brown was not an eye witness to events leading to the death of King.

"7. Final proofs of death were duly submitted to the defendant on May 25, 1943.

"8. The single issue presented by this case is whether or not the deceased's death fell within the exemption provided in the contract of insurance which reads as follows: 'This Order shall not be liable to any person for any

benefit for death resulting from participation, as a passenger or otherwise, in aviation or aeronautics, (except as a fare-paying-passenger in a licensed aircraft operated on a regular schedule)', it being conceded that in making the trip from the base field at James Island on February 9, 1943, he was a not a fare-paying passenger on a licensed aircraft operated on a regular schedule."

II

Plaintiff's counsel have handed to me the application for insurance, the certificate of insurance, and the constitution and by-laws of the defendant in accordance with the agreement in the foregoing stipulation. The application for membership in, and to be insured, by the defendant insurance company, together with a deposit of the requisite fee and premium therefor, was made by Drew L. King in this State to Spartan Council, No. 323 of Spartanburg, South Carolina, upon which application the defendant delivered to him its insurance Certificate No. 276431-R at Spartanburg, South Carolina.

Conclusions of Law

I

The contract of insurance in this controversy is a South Carolina contract, and it must be governed, solved and construed by laws of this State.

[fol. 5]

II

The proximate cause of the death of Lieutenant King was accidental drowning within the terms of the policy of insurance; his death did not result from participation as a passenger or otherwise in aviation or aeronautics within the meaning of the exclusion provisions of the policy.

III

Plaintiff is entitled to judgment against defendant in the sum of Five Thousand Dollars ($5,000.00), with interest at six per cent from the 25th day of August, 1943, together with the costs of this action.

Entry of appropriate judgment is directed accordingly.

C. C. Wyche, United States District Judge.

Dated: Spartanburg, South Carolina, May 24, 1946.

OPINION OF THE DISTRICT COURT

The opinion of the District Court, omitting the caption, follows:

The defendant in this action is a Fraternal Benefit Association. The plaintiff, as beneficiary of a certificate of membership insurance, issued by the defendant on the life of her husband, Drew L. King, seeks to recover the sum of Five Thousand Dollars ($5,000.00), from the defendant upon its insurance contract, which provided that it would pay to the beneficiary the sum of Five Thousand Dollars ($5,000.00), upon receipt of due proof of the death of the [fol. 6] insured effected solely through external, violent and accidental means.

The facts have been stipulated by the parties, and, are as follows:

"1. • • •

"2. Plaintiff is a resident of Spartanburg, South Carolina.

"3. The defendant is a Fraternal Benefit Association organized and maintained for the purpose, among other things to 'establish funds to indemnify its members for disability or death resulting from accidental means'; incorporated under the laws of the State of Ohio, and licensed to do business as a Fraternal Benefit Association in the State of South Carolina.

"4. On September 20, 1938, the defendant issued the deceased Drew Lagrone King, Certificate No. 276431-R hereto attached as Exhibit 'A' thereby certifying that he had been accepted as an insured member of said Order under Class 'A'. Said Certificate further provided that it, together with the application for insurance, constitution and by-laws and certain other papers not involved in this litigation, should constitute the contract between the parties. This contract was in force on February 9, 1943. The papers and documents referred to in this paragraph may be handed to the Court by either party during the course of the trial.

"5. The portions of the defendant's constitution and by-laws relevant to this action are:

"(a) Article 15, Section 13, providing the indemnity of $5,000.00 in the event of death effected solely through external violent and accidental means.

"It is conceded that the deceased elected Option 2 with reference to the mode of settlement providing that the entire indemnity should be paid within ninety days from [fol. 7] the receipt by the Supreme Executive Committee of satisfactory final proof of death. The plaintiff herein was the duly designated beneficiary, and if entitled to recover against the defendant, the amount of such recovery should be $5,000.00, with interest at six per cent (6%) from the twenty-fifth day of August, 1943, and costs.

"(b) Article 15, Section 16, which provides 'this Order shall not be liable to any person for any benefit for death resulting from participation, as a passenger or otherwise, in aviation or aeronautics (except as a fare-paying passenger in a licensed aircraft operated on a regular schedule * * *).

"6. On February 9, 1943, the deceased, a Second Lieutenant in the Civil Air Patrol with Coastal Patrol No. 8, was stationed at James Island near Charleston, South Carolina. On the morning of February 9, 1943, at around 8 A. M. he left his base field as an observer in a land based plane piloted by a First Lieutenant, Clarence Rawls, on a routine coastal patrol flight. Included in the patrol was a second plane piloted by Lieutenant James A. Taylor with Lieutenant K. C. Bates as Observer. All of the above parties were members of the Civil Air Patrol.

"About 9:30 A. M. the plane occupied by Rawls and King developed motor trouble and was forced down on the Atlantic Ocean at about thirty miles out from Cape Fear, North Carolina.

"At around 9:33 A. M. Taylor and Bates observed the plane on the water, where it had apparently landed in a normal landing attitude. Both Rawls and King were out of the plane and in the water wearing inflated life jackets and neither seemed to Taylor or Bates to have been injured from the landing. Taylor and Bates circled them [fol. 8] at an altitude of about fifty feet and could see both men signalling with their arms. They dropped them emergency kits containing whiskey and concentrates and radioed their situation and position to the base. The plane sank within about four minutes after being first observed on the water. Taylor and Bates went up to an altitude of about 500 to 600 feet so that they could keep King and Rawls in sight and continued to circle them for

a period of two to two and one-half hours when a shortage of gasoline forced them to head for their base. During this period King was alive.

"The two men were picked up by a Navy boat about 2 P. M. both being dead at the time. Their bodies were examined by Lieutenant Com. Landis C. Brown (a duly licensed and practicing physician in civil life) of the United States Navy at the Section Base Hospital of Fort Caswell at Southport, North Carolina. He found one or two slight scratches on Lieutenant King's body but found no marks severe enough to be called an injury or considered a contributory cause of death. His diagnosis as shown in the proof of death furnished by plaintiff to defendant, was 'Drowning as a result of exposure in the water after failure of airplane motor.' Lt. Com. Brown was not an eye witness to events leading to the death of King.

"7. Final proofs of death were duly submitted to the defendant on May 25, 1943.

"8. *The single issue presented by this case is whether or not the deceased's death fell within the exemption provided in the contract of insurance which reads as follows: 'This Order shall not be liable to any person for any benefit for death resulting from participation, as a passenger or otherwise, in aviation or aeronautics,* (except as a fare-paying passenger in a licensed aircraft operated on a regular schedule)', it being conceded that in making the trip from the base field at James Island on February 9, 1943, [fol. 9] he was not a fare-paying passenger on a licensed aircraft operated on a regular schedule."

The application for membership in, and to be insured by, the defendant insurance company, together with a deposit of the requisite fee and premium therefor, was made by Drew L. King in this State to Spartan Council, No. 323 of Spartanburg, South Carolina, upon which application the defendant delivered to him its insurance certificate at Spartanburg, South Carolina.

Under such facts, (as well as under State statutes)[1]

[1] "Condition Precedent to Doing Business in This State.—It shall be a further condition precedent to the right of any such corporation to do business in this State, that it shall be taken and deemed to be the fact irrebuttable, and part and

the insurance certificate involved in this controversy is a South Carolina contract, governed and solvable by the laws of this State. *Owen* v. *Insurance Co.*, 84 S. C. 253, 256; *Cantey, Adm'r* v. *Phila. Life Ins. Co.*, 166 S. C. 181, 188; *Fountain & Herrington* v. *Mutual Life Ins. Co.*, (CCA 4), 55 F. 2d 120.

[fol. 10] It has been decided in South Carolina, that cause of death, within the meaning of insurance against death resulting from external, violent and accidental means, is the immediate cause, and not the remote cause. *Goethe* v. *New York Life Ins. Co.*, 183 S. C. 199, 190 S. E. 451. In that case, Goethe died of a heatstroke, following vigorous efforts to put out a fire. On the issue of whether death was the culmination of angina pectoris, a disease, or heatstroke, an accident, the Supreme Court of South Carolina said: "In our opinion, the heatstroke suffered by the insured in the case at bar was in and of itself an accidental means, • • •."

The South Carolina Supreme Court has also adopted the rule, as to exclusion clauses in accident insurance policies, that liability is to be determined by the cause of death, and not by circumstances or status of the insured.

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parcel of all contracts entered into between such corporation and a citizen or corporation of this State, that the taking or receiving, from any citizen or corporation of this State, of any charge, fee, payment, toll, impost, premium or other moneyed or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this State, and that the place of the making and of performance of such contract shall be deemed and held to be within this State, anything contained in such contract, or any rules or by-laws of such corporation to the contrary notwithstanding." *Code of Laws of South Carolina*, 1942, § 7773.

"Corporations Doing Business in This State Deemed Doing Business Under This Chapter.—All such corporations hereafter doing business in this State, as defined in this chapter, shall be deemed and held to be doing such business under and in pursuance of the terms and conditions of this chapter, and that such terms and conditions shall be deemed and taken in all the courts of this State to be a part and parcel of all contracts hereafter entered into be-

Young v. *Life & Casualty Insurance Co.*, 204 S. C. 386, 29 S. E. (2d) 482. In sustaining recovery for death of a soldier in an automobile accident while on furlough, even though the exclusion clause of the policy excluded liability "* * * if death results from bodily injuries sustained while participating in aviation or aeronautics as a passenger or otherwise, or *while* the insured is in military or naval service in time of war", (emphasis added) the Court in this case said: "We have denied the status theory in previous cases involving insurance clauses. In *McGee* v. *Globe Indemnity Co.*, 173 S. C. 380, 175 S. E. 849, it was held that a provision in a policy indemnifying the owner of an automobile against loss or damage to his car, which should not apply while the car was used by any person in violation of law as to age, or by any person under the age of 16 years, did not relieve the insurer of liability for an accident, although the operator of the car at the time was under 16 years of age. The Court held that in addition it must be shown that a causal connection existed between [fol. 11] the age of the driver and the accident. In the McGee case, *supra*, the insurer specifically raised the question of status or condition. The Court stated with reference to this contention: 'We are of the opinion that the distinction advanced between the excluded act and condition is without any logical basis. * * *'. The rule established by the

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tween such corporations and a citizen or corporation of this State, anything contained in any such contract or in any rules or by-laws of such corporation to the contrary notwithstanding." *Code of Laws of South Carolina*, 1942, § 774.

"Subject to Laws-Limitations.—All and every such foreign corporation carrying on business or owning property in this State shall be subject to the laws of the same in like manner as corporations chartered under the laws of this State, but nothing herein contained shall be construed to permit any such foreign corporation to exercise any franchise or enjoy any privilege or immunity other than the right to own property and carry on business in like manner as individuals, natural born citizens of such State of the United States or of foreign countries, might do, and subject to the terms and conditions of this chapter." *Code of Laws of South Carolina*, 1942, § 7776.

Reynolds case (Reynolds v. Life & Casualty Ins. Co., 166 S. C., 214, 164 S. E., 602), is obviously founded upon the reasonable view that when the parties made the contract of insurance, they were not inserting a mere arbitrary provision but that it was the purpose of the insurance company to relieve itself of liability from accidents caused by the excluded condition."[2] See also, *Bailey* v. *United States Fidelity & Guaranty Co.*, 185 S. C. 169, 171, 193 S. E. 638.

In the construction of insurance contracts it must be remembered that the courts should not ignore the fact that the primary object of all insurance is to insure and that, in cases of doubt, uncertainty, manifest ambiguity; or susceptibility of two equally reasonable interpretations, since the language used is the selection and arrangement of the insurer, such contracts must be liberally construed in favor of the insured. *Parker* v. *Jefferson Standard Life Ins. Co.*, 158 S. C. 394, 397, 155 S. E. 617. Insurance policies are drawn by the legal advisers of the insurance company who study with care the decisions of the courts, and, with such decisions in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurance company. *Manufacturers' Accident Indemnity Co.* v. *Dorgan*, (CCA 6) 58 Fed. 945, 956.

[fol. 12] While, as stated before, I must be guided, in construing the insurance contract, by the law of South Carolina, I think it should be observed that the rules of construction of accident insurance policies, the principles of law declared, and the conclusions reached by the South Carolina Supreme Court in the foregoing decisions of *Goethe* v. *New York Life Ins. Co., supra; Young* v. *Life & Casualty Insurance Co., supra; McGee* v. *Globe Indemnity Co., supra; Reynolds* v. *Life & Casualty Ins. Co., supra; Bailey* v. *United States Fidelity & Guaranty Co., supra; Parker* v.

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[2] It is true that the Circuit Court of Appeals for the Fourth Circuit in the case of *Myers v. Ocean Accident & Guarantee Corporation*, 99 F. 2d 485, observed that the weight of authority was against the principle laid down in this case, but in that case the court was not governed by the South Carolina decisions. Here, I must be governed by the South Carolina law, as declared by the South Carolina Supreme Court in construing the insurance contract.

Jefferson Standard Life Ins. Co., supra, find respectable and weighty support in the clear reasoning of Circuit Judge Taft, later Chief Justice of the Supreme Court, in the decision of the Circuit Court of Appeals of the Sixth Circuit in the case of *Manufacturers' Accident Indemnity Co.* v. *Dorgan, supra*, and in the logic of the opinion of Circuit Judge Minton in the decision of the Circuit Court of Appeals of the Seventh Circuit in the case of *Bull* v. *Sun Life Assurance Co.*, 141 F. 2d 456, cert. den. 323 U. S. 723, as well as in Lord Bacon's maxim, quoted with approval by the Tenth Circuit Court of Appeals in the case of *Aetna Life Ins. Co., Hartford, Conn.* v. *Conway*, 102 F. 2d 743.[3]

In the *Dorgan Case*, the deceased, (husband of the plaintiff in that case) was last seen alive fishing in a brook. Twenty minutes later, he was discovered lying in the brook, with his face downward, and submerged in six inches of water, dead. The defendant insurance company contended, and evidence was introduced by it tending to show that the deceased had suffered from defective action of the heart in its aortic valve. The jury found adversely [fol. 13] to defendant's contention, and rendered a verdict for the plaintiff. In affirming the judgment of the District Court, Judge Taft said: "The policy provided, as we have already seen, that the benefits under it extended to the death of the insured through external, violent, and accidental means, and that it should not cover accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by or in consequence of fits, vertigo, somnambulism, or any disease existing prior or subsequent to the date of the certificate, or to any cause excepting where the injury was the sole cause of the disability or death. In the application the deceased stated that he was aware that the insurance would not extend to any bodily injury happening directly or indirectly, in

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[3] The defendant relied upon the cases of *Neel v. Mutual Life Ins. Co. of New York*, (CCA 2) 131 F. 2d 159, and *Green v. Mutual Ben. Life Ins. Co.*, (CCA 1) 144 F. 2d 55, but the opinions in these cases are not in conformity with the decisions of the South Carolina Supreme Court, and are contrary to the reasoning of the court in the *Dorgan* and *Bull Cases*. Furthermore, the facts in these cases, relied upon by the defendant, are distinguishable from the facts in the case now under consideration.

consequence of disease, or to death or disability caused wholly or in part by bodily infirmities or disease, or to any case where the accidental injury was not the proximate and sole cause of disability or death.'

"It is well settled that an involuntary death by drowning is a death of external, violent, and accidental means. *Trew v. Assurance Company*, 6 Hurl. & N. 838; *Winspear v. Insurance Co.*, 6 Q. B. Div. 42; *Reynolds v. Insurance Co.*, 22 Law T. (N. S.) 820.

"We are of the opinion that in the legal sense, and within the meaning of the last clause, *if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death unless it appeared that death would have been the result, even had there been no water at hand to fall into.* The disease would be but the condition; the drowning would be the moving, sole, and proximate cause.

"In *Winspear v. Insurance Co.*, 6 Q. B. Div. 42, the terms of the policy provided 'that it should cover any personal injury caused by accidental, external, and visible [fol. 14] means, if the direct effect of such injury should occasion his death; and it provided, further, that it should not extend to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease.' The insured was seized with an epileptic fit and fell into a stream, and was there drowned while suffering from a fit. It was held that the death was within the risk covered by the policy, and that the proviso did not apply.

"In *Lawrence v. Insurance Co.*, 7 Q. B. Div. 216, the policy provided:

"'This policy covers injuries accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of the death to the insured, but it does not insure in case of death arising from fits, * * * or any disease whatsoever, arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly, or jointly with such accidental injury.'

"The insured, while at a railway station, was seized with a fit, and fell forward off the platform across the

railway when an engine and carriages which were passing went over his body, and killed him. It was held that 'the death of the insured was caused by an accident, within the meaning of the policy, and that the insurers were liable.'

"Mr. Justice Watkin Williams said in this case: 'The true meaning of this proviso is that, if the death arose from a fit, the company is not liable, even though accidental injury contributed to the death in the sense that they were both causes, which operated jointly in causing it. That is the meaning, in my opinion, of this proviso. But it is essential to that construction that it should be made out that the fit was a cause, in the sense of being the proximate and immediate cause of the death, before the company is [fol. 15] exonerated, and it is not the less so because you can show that another cause intervened and assisted in the causation.'

"After giving some illustrations, the learned justice continued: 'I therefore put my decision on the broad ground that, according to the true construction of this policy and this proviso, this was not an act arising from a fit, and therefore whether it contributed directly or indirectly, or by any other mode, to the happening of the subsequent accident, seems to be wholly immaterial, and the judgment of the court ought to be in favor of the plaintiff.'

"These cases are referred to with approval by Mr. Justice Gray in delivering the opinion of the supreme court in case of *Insurance Co. v. Crandal*, 120 U. S. 527-532, 7 Sup. Ct. 685. They sufficiently establish the proposition that, if the deceased in this case died by drowning, then drowning was in law the sole and proximate cause of the disability of death.

"We now proceed to inquire whether, if the fall of the deceased into the water was caused by fits, vertigo, or any disease, such accidental death could be said, within the meaning of the policy, to have been 'caused directly or indirectly, wholly or in part, by or in consequence of such fits, vertigo, or disease.' In our opinion the adjective 'accidental' qualifies not only 'injuries,' but also 'death,' and therefore an accidental death by drowning does result from, and is caused indirectly by, fits, vertigo, or other disease, if the fall into the water, from which drowning ensues, is caused by such disease. The excep-

tion is broader than the exceptions in the policies considered in the Winpsear and Lawrence Cases, and is made so by the use of the word 'indirectly.' As can be seen from the words of Mr. Justice Williams quoted above in the Lawrence Case, if that policy had provided that it should not apply to an accident to which a fit contributed [fol. 16] indirectly, the company would not, in his opinion, have been liable." (Emphasis added)

In the recent case of *Bull* v. *Sun Life Assurance Co., supra*, there was for construction by the Court an exclusion clause, more favorable to the insurer than is the exclusion clause in the case here under consideration. The exclusion clause in the *Bull Case* was, "Death as a result, directly or *indirectly*, of service, travel, or flight in any species of aircraft, as a passenger or otherwise, is a risk not assumed under this policy." (Emphasis added.)

The facts in the *Bull Case* disclose that: "On February 5, 1942, Richard Bull, who was then a Lieutenant (j. g.) in the United States Naval Reserve, was commanding officer and alternate pilot of a seaplane which was engaging in routine patrol duty in the South Pacific. Coming across some Japanese ships at anchor in a small harbor, Lieutenant Bull and his crew commenced bombing them, but anti-aircraft fire and Japanese Zeroes peppered their plane. The port motor was shot out, gasoline poured into the hull filling the plane with fumes, and ten or fifteen miles from the scene of the encounter they were forced to make a landing on the water, 500 to 1,000 yards off the island of Amboina, Dutch East Indies. The plane did not crash, but after landing it could not have flown again without repairs. The motors were immediately cut off and for ten minutes the plane was afloat with its anchor overboard. Gasoline was still escaping from the gas tanks into the hull of the plane and spreading upon the surrounding water so that the whole area was in an explosive condition.

"Two of the plane's crew, Hargrave and Nelson, with a wounded comrade, debarked from the plane in a rubber boat. Hargrave testified by deposition that Lieutenant Bull was inside the plane the last time that he saw him. Nelson testified by deposition that the last time he saw him, he was outside the plane on the fuselage, trying to [fol. 17] launch a rubber boat. While Lieutenant Bull was in that position, attempting to escape from the immobile,

disabled plane, a Japanese seaplane dived to within thirty to fifty feet of the crippled plane, strafing it and the water around it. According to Nelson, Lieutenant Bull was exposed to this machine gun fire. To protect themselves, Nelson and Hargrave abandoned their life raft and dived into the water. The first strafing not having sunk the disabled plane, the enemy plane circled and returned for a second attack. While the witnesses were under the water, they heard an explosion, and when they emerged, the area where the plane had been was in flames, with only the tip of a wing still visible. Lieutenant Bull was never seen thereafter. Whether he was on the fuselage at the time of the second strafing does not appear."

Among other things, Judge Minton, in his opinion affirming the judgment for the insured, said: "The question presented to us is whether Lieutenant Bull met his death 'as a result, directly or indirectly, of service, travel, or flight' in that seaplane. This is a legal question that requires us to construe the contract of insurance. It is elementary that such contracts are strictly construed against the insurance company. Unless the clear and reasonable construction of this contract supports the contention of the defendant, we must affirm the District Court.

* * *

"It is the defendant's contention that Lieutenant Bull's death was the indirect result of service, travel, or flight in that patrolling seaplane. Let us consider the case from this view. The seaplane had landed and was so disabled that it would never fly again without repairs. It was anchored, and the engines had been stopped for nearly ten minutes. Service, travel, and flight in that plane had come to an end. Lieutenant Bull, as the evidence showed, was out upon the fuselage trying to inflate a rubber boat for [fol. 18] the purpose of escape. While he was in that position, the jury had a right to infer, a Japanese plane shot him and from those bullet wounds he died. Was his death a result of aviation or of war? What connection, direct or indirect, did his death have with that disabled aircraft which lay in the water, useful only as a raft? *The sole connection was that Lieutenant Bull arrived at this place by way of aircraft. But he was not injured in the arrival. He was not injured by service, travel, or flight in the aircraft. He was killed after those things had terminated.* * * *

"We hold that disengagement from service, travel, and

flight in that seaplane had taken place in the case at bar, and that Lieutenant Bull's death had no connection, directly or indirectly, with service, travel, or flight in that seaplane within the meaning of the policy. Where the service travel, and flight in the aircraft had definitely ended, and the only connection the insured had with the plane at the time he met his death at the hands of a strafing Jap was that he had arrived by plane at the place where the Jap shot him, his death was too remote to be considered the result, direct or indirect, of service, travel, or flight in an aircraft. * * * (Emphasis added.)

The Circuit Court of Appeals of the Tenth Circuit in the case of *Aetna Life Ins. Co., Hartford, Conn.* v. *Conway*, 102 F. 2d 743, quotes with approval the following from the decision in the case of *Meyer* v. *Fidelity & Casualty Co. of New York*, 96 Iowa 378, 65 N. W. 328, 330, 59 Am. St. Rep. 374: "It seems to be a well-settled rule in insurance law to attribute an injury or loss to its proximate cause only; and, if this be true, the disorder, whatever it may have been, was but a condition, the fall being the sole and proximate cause of the injury. Lord Bacon's maxim that 'it were infinite for the law to judge the cause of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause, and [fol. 19] judgeth of acts by that, without looking to any farther degree,'—seems to apply to this character of cases." (Citing *Manufacturers' Accident Ins. Co.* v. *Dorgan*, 6 Cir., 58 F. 945, 22 L. R. A. 620.)

In the instant case, Lieutenant King arrived by way of aircraft at the place near where he was later accidentally drowned, but he was not injured in the arrival or in leaving the plane which had brought him there. He left the plane uninjured and wearing an inflated life jacket. The plane had not crashed, but had landed on the water in a normal landing attitude and sank within a few minutes after its landing. Service, travel, flight and participation in aviation or aeronautics in that plane had come to an end without injury to Lieutenant King. At the time the plane sank, King was alive and uninjured and had the protection of an inflated life jacket which he was wearing. He was known to have been alive for a period of, at least, two to two and one-half hours thereafter. Lieutenant Taylor, piloting another plane, had kept King in sight

for two or two and one-half hours, when a shortage of gasoline in his plane forced him to return to his base.

To bar recovery by the plaintiff in this case, it would be necessary to write some other wording into the exclusion clause involved, which was not written there by the defendant insurance company when its policy was issued to Lieutenant King. I find that disengagement from participation in aviation or aeronautics had taken place, and under the facts, and applicable law in this case, it cannot be said that Lieutenant King's death resulted from participation, as a passenger or otherwise, in aviation or aeronautics. Where the service, travel and flight in the aircraft had definitely ended, and the only connection the insured had with the plane at the time he met his death by drowning, was that he had arrived by plane at a place near where he was drowned, his death was too remote to be considered *the result* of participation in aviation or [fol. 20] aeronautics. *Bull v. Sun Life Assurance Co., supra.*

I must, therefore, conclude that the proximate cause of the death of Lieutenant King was accidental drowning, within the terms of the policy;[*] and that his death did not result from participation as a passenger or otherwise in aviation or aeronautics, within the meaning of the exclusion provisions of the policy, and consequently the plaintiff is entitled to recover from the defendant the sum of Five Thousand Dollars ($5,000.00), with interest at six per cent (6%), from the 25th day of August, 1943.

Counsel may submit an appropriate order accordingly.

(S.) C. C. Wyche, United States District Judge.

Dated at Spartanburg, South Carolina, May 24, 1946.

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[*] It is well settled that an involuntary death by drowning is a death by external, violent and accidental means. *Cooley's Briefs on Insurance*, 2d Ed., Vol. 6, page 5254; *De Van v. Commercial Travelers' Mut. Acc. Ass'n. of America*, 51 N. E. 1090, 157 N. Y. 690; *U. S. Mut. Acc. Ass'n. v. Hubbell*, 47 N. E. 544, 56 Ohio St. 516, 40 L. R. A. 453; *Anderson v. Inter-State Business Men's Accident Ass'n. of Des Moines, Iowa*, 188 N. E. 844, 354 Ill. 538; *Manufacturers' Accident Indemnity Co. v. Dorgan, supra.*

Judgment of the District Court

The judgment of the District Court, omitting the caption, follows:

An Order for Judgment in favor of the Plaintiff Mary Bell King, for the sum of Five Thousand and no/100 ($5,000.00) Dollars together with interest at the rate of six per cent, from August 25, 1943, and costs, against the Defendant, The Order of United Commercial Travelers of America, having been filed on August 28, 1946, and [fols. 21-22] the interest as directed in said Order for Judgment having been calculated to be the sum of Nine Hundred Sixteen and 66/100 ($916.66) Dollars, and the costs having been taxed in the sum of Twenty-five and no/100 ($25.00) Dollars.

Judgment is hereby entered in favor of the Plaintiff, Mary Bell King, against the Defendant, The Order of United Commercial Travelers of America, for the sum of Five Thousand Nine Hundred Sixteen and 66/100 ($5,916.66) Dollars and costs in the sum of Twenty-five ($25.00) Dollars, a total of Five Thousand Nine Hundred Forty-one and 66/100 ($5,941.66) Dollars.

Signed, sealed and entered this 16th day of September, 1946. W. D. White, Clerk, United States District Court, Western District of South Carolina.

[fol. 23] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5559

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Appellant,

versus

MARY BELL KING, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville

November 20, 1946, the transcript of record is filed and the cause docketed.

November 23, 1946, the appearance of F. Dean Rainey is entered for the appellant.

November 25, 1946, the appearance of C. F. Haynsworth, Jr., and C. F. Haynsworth is entered for the appellant.

November 26, 1946, the appearance of Miller C. Foster and Jesse W. Boyd is entered for the appellee.

November 29, 1946, stipulation as to the time to furnish statement under section 3 of rule 10 is filed.

Same day, stipulation to continue case is filed.

ORDER CONTINUING CASE—Filed December 2, 1946

(Style of Court and Title Omitted)

Upon the Stipulation of counsel for the respective parties in the above entitled cause,

It is Ordered that this cause be, and the same is hereby, continued from the January term 1947, of this Court, to the next term thereafter.

November 30, 1946.

John J. Parker, Senior Circuit Judge.

[fol. 24] February 18, 1947, brief and appendix on behalf of the appellant are filed.

March 4, 1947, brief on behalf of the appellee is filed.

ARGUMENT OF CAUSE

March 13, 1947 (March term, 1947), cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 25] OPINION—Filed April 9, 1947

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5559

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Appellant,

versus

MARY BELL KING, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville. Civil Action.

(Argued March 13, 1947. Decided April 9, 1947)

Before Parker, Soper and Dobie, Circuit Judges.

F. Dean Rainey and C. F. Haynsworth, Jr., (Haynsworth & Haynsworth and Rainey & Fant on brief) for Appellant; [fol. 26] and Miller C. Foster and Jesse W. Boyd (Johnson, Johnson & Foster on brief) for Appellee.

DOBIE, Circuit Judge:

The scope of an aviation exclusion clause in a contract of life insurance is the question raised by this appeal. The insured, Lieutenant Drew L. King, a resident of South Carolina, was a flight observer serving with the Civil Air Patrol. He met his death on February 9, 1943, and this suit was instituted by the beneficiary of the policy, the appellee here, against the insurance company, appellant, for the full amount of the policy. The lower court awarded judgment to the plaintiff on stipulated facts. The insurance company has duly appealed.

At eight o'clock in the morning of the day mentioned the insured and a pilot left their base for a routine coastal patrol flight off the shores of North Carolina. The patrol was made in a land based plane along with another plane of like make. About an hour and one-half after take-off, the plane in which the insured was riding developed serious engine trouble. This emergency forced the pilot to bring the plane down at sea some thirty miles from the coast. Apparently the descent was sufficiently controlled to permit

putting the plane on the water in a normal landing position. The men managed to inflate their life jackets and free themselves from the plane before it sank a few minutes later.

There is no question that both men were alive at this time as they were seen to signal the other plane. A subsequent examination confirmed the belief that the men were not [fol. 27] injured by the impact of the plane striking the water. Meanwhile the occupants of the second plane, after dropping an emergency kit, circled the distressed men and tried to establish radio contact with the base. At Noon, which was two and one-half hours later, no help had arrived and the second plane, because of a shortage of gasoline, was forced to return to the base. The men in the water were alive at that time. When a Navy boat finally arrived at two in the afternoon, both men were dead.

A Naval physician (not an eyewitness to the events) issued a statement of death after examining the bodies, which contained the diagnosis: "Drowning as a result of exposure in the water after failure of airplane motor."

The contract of insurance, which the insured had made in South Carolina with the appellant insurance company, contained the following clause:

> "This order shall not be liable to any person for any benefit for death resulting from participation, as a passenger or otherwise, in aviation or aeronautics, (except as a fare paying passenger in a licensed aircraft operated on a regular schedule)."

Although South Carolina law would be controlling, the highest court in that State has never considered the precise question here involved. Accordingly the lower court, in an effort to apply South Carolina law, resorted to some general maxims of insurance law that have been invoked on occasions by South Carolina courts. By stressing particularly the insured's uninjured physical dis-engagement from the airplane, and coupling this with the rule of construction that ambiguous or doubtful clauses must be re- [fol. 28] solved against an insurer, the District Court reached the conclusion that the exclusion clause of the policy was not applicable. We are unable to agree with that conclusion either on reason or authority.

Aside from the many authorities on this question (to which we will advert later in this opinion), we think

the exclusion clause clearly comprehends the very situation that here developed. Any other conclusion must ignore the plain meaning and presence of the word "resulting." To give that word the effect that it must have in everyday speech (and as understood by laymen as well as lawyers) obviates the necessity for technical and artificial rules of construction. In our view of the case it is as undesirable as it is unnecessary to borrow from the law of torts the nuances and subtleties which attend such a phrase as "proximate cause" and to attempt an application of these nuances and subtleties to the facts of the instant case. There is little, if anything, to construe. In undertaking an aerial flight over the ocean in a land-based plane, man must reckon with the perils of the sea which are as imminent and real as the unrelenting force of gravity. Just as flight over the land brings forth the danger of violent collision with the earth, we have the dangers of the sea in over-water flight. That men may remain alive for varying periods of time before succumbling does not change the picture. We think it a rather violent fiction to say that death, under such circumstances, comes from accidental drowning. Common knowledge and experience fairly shout of the dangers of shock, exposure and drowning when a flight is taken over water in the winter time in a land based plane.

Out of the abundance of wisdom that comes with hindsight it might have been better to have also inserted the [fol. 29] words "directly or indirectly" in the exclusion clause. Actually such words were not vital here and would have added little to the force of the word "resulting."

We are asked by counsel for appellee to notice the harrowing experiences and remarkable rescue of Captain Eddie Rickenbacker. The contention is made that when a man leaves a plane under such conditions he is in a position of "potential safety," i. e., he can be saved. To pursue this somewhat ingenious argument is to invert the real question of the case. It is true that rescue, routine or fortuitous, may remove a man from peril. But it does not follow that the failure of rescue brings the peril that causes death. When the insured was in the cold waters of the Atlantic Ocean in February, he was not in a position of "potential safety." He was in imminent peril of death, unless rescue came and also came quickly. We are unable to see how, under these circumstances, death resulted in any way other than from participation in aviation.

There is more than ample authority to support this view. In *Neel* v. *Mutual Life Ins. Co. of N. Y.*, (C. C. A. 2), 131 F. (2d) 159, the insured, after landing his plane on the ocean, was drowned while trying to reach shore. Under a similar aviation exclusion clause, the insurer was held not liable. Judge Augustus Hand, speaking for the Court, said (131 F. (2d) at page 160):

> "The policy provides that Double Indemnity shall not be payable if death resulted 'from participation in aeronautics' and it seems quite contrary to the natural meaning of the proviso to say that Stubbs did not meet his death from 'participation in aeronautics' merely because he may not have been killed by impact upon the water. If he landed in the open sea, even though with- [fol. 30] out immediate injury, drowning was an almost inevitable consequence. To say that his death did not result 'from participation in aeronautics' would exclude from the proviso of the policy the most ordinary risks involved and limit the effect of the clause in an unexpected and unreasonable way. As Judge Cardoza said in *Bird* v. *St. Paul F. & M. Ins. Co.*, 224 N. Y. 47, 120 N. E. 86, 87, 13 A. L. R. 875: 'General definitions of a proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract. It is his intention, expressed or fairly to be inferred, that counts. * * * The same cause producing the same effect may be proximate or remote as the contract of the parties seem to place it in light or shadow. That cause is to be held predominant which they would think of as predominant. A common-sense appraisement of everyday forms of speech and modes of thought must tell us when to stop. It is an act of "judgment as upon a matter of fact."' "

This was followed in *Green* v. *Mutual Benefit Life Ins. Co.*, (C. C. A. 1), 144 F. (2d) 55, in which the insured, a Naval aviator, was forced to land his plane on the water and was drowned while attempting to reach his life raft. Other instructive cases are *Pittman* v. *Lamar Life Insurance Co.*, (C. C. A. 5), 17 F. (2d) 370; *Wendorff* v. *Missouri State Life Ins. Co.*, 318 Mo. 363, 1 S. W. (2d) 99, 57 A. L. R. 615; and *Blonski* v. *Banker's Life Co.*, 209 Wis. 5, 243 N. W.

410. Compare: *Commercial Union Assurance Co.* v. *Pacific Union Club*, (C. C. A. 9), 169 Fed. 776; *Pacific Union Club* v. *Commercial Union Assurance Co.*, 12 Cal. App. 509, 107 Pac. 728; *Tierney* v. *Occidental Life Insurance Co.*, 89 Cal. App. 779, 265 Pac. 400.

[fol. 31] Counsel for the beneficiary virtually conceded in oral argument (as indeed they must) that the *Neel* and *Green* cases, *supra*, are indistinguishable in principle from this case. They rely, however, on *Bull* v. *Sun Life Assurance Co. of Canada*, (C. C. A. 7), 141 F. (2d) 456, *cert. denied*, 323 U. S. 723. In that case the insured went down a few hundred yards from shore, after his plane was damaged by anti-aircraft fire. After the emergency landing, the insured was seen standing on the fuselage, attempting to launch a rubber boat. Other members of the crew, who had already escaped in a rubber raft, dived into the water when a Japanese plane swept low to strafe the crippled American plane. An explosion was heard, the crippled plane burst into flames, and the insured was never seen again. In holding the insurer liable, the Court, by a two to one decision, emphasized the war risk of enemy fire and noted that the jury could have found this intervening force caused death. We agree with the observation in the *Green* case which viewed the intervening force in the *Bull* case as a distinguishing feature. 144 F. (2d) at page 58.

We come, then, to the last argument of the plaintiff (appellee) which is that, irrespective of the foregoing, the South Carolina law would permit recovery in a case of this character. This phase of the argument rests primarily on the *dictum* in *Bolt* v. *Life & Casualty Ins. Co.*, 156 S. C. 117, 152 S. E. 766, 777:

> "* * * our Court has made it the almost universal rule to construe any clause of an insurance policy against the insurer when there existed the least doubt as to the meaning of the language employed."

[fol. 32] We agree that this is an exceedingly broad statement. Nevertheless, in our view of the instant case, the meaning of the language employed in the policy is clear on its face. In any event, we believe that the highest court in South Carolina would not make specific application of such a generalized *dictum*, which, if applied to the facts here, would fly in the face of reason and the very considerable

authority that has expressed the view we now follow. It would certainly not conform with accepted theories of proximate cause. See *Horne* v. *Atlantic Coast Line*, 177 S. C. 461, 181 S. E. 642.

Counsel for appellee, while not contending that we are bound by it, have cited a decision rendered in the Court of Common Pleas for the County of Spartanburg which allowed the same plaintiff to recover on a similar policy with another insurance company on the same statement of facts now before us. That opinion, not binding on other South Carolina courts, is not binding on us and we cannot treat it as a final expression of South Carolina law. *Erie Railroad* v. *Tompkins*, 304 U. S. 64. While we entertain nothing but respect for that court, we must reject its view of this case for the reasons previously expressed. That opinion, it might be added, which was rendered July 29, 1946, relied on the District Court's ruling in the instant case now before us.

The case of *Goethe* v. *New York Life Ins. Co.*, 183 S. C. 199, 190 S. E. 451, is urged as an instance in which terms in insurance policies should be construed according to the ordinary and usual understanding of its signification by "common people." We are unable to see how this strengthens the plaintiff's case, for our conclusion is [fols. 33-34] reached by the express adoption of the rule urged by plaintiff.

We have carefully considered other cases cited by the plaintiff: *McGee* v. *Globe Indemnity Co.*, 173 S. C. 380, 175 S. E. 849; *Young* v. *Life & Casualty Co.*, 204 S. C. 386, 29 S. E. (2d) 482; *Myers* v. *Ocean Mftg. Co.*, (C. C. A. 4), 99 F. (2d) 485; *Manufacturers Accident Indemnity Co.* v. *Dorgan* (C. C. A. 6), 58 Fed. 945, and find them inapplicable and not controlling.

The judgment of the lower court is reversed.

Reversed.

[fol. 35] JUDGMENT—Filed and Entered April 9, 1947

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5559

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Appellant,

vs.

MARY BELL KING, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of South Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of South Carolina, at Greenville, for further proceedings in accordance with the opinion of the Court filed herein.

April 9, 1947.

John J. Parker, Senior Circuit Judge, Morris A. Soper, U. S. Circuit Judge, Armistead M. Dobie, U. S. Circuit Judge.

[fol. 36] May 9, 1947, petition of appellee for a stay of mandate is filed.

ORDER STAYING MANDATE—Filed May 12, 1947

(Style of Court and Title Omitted)

Upon the application of the appellee, by her counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed

pending the application of the Appellee in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for the writ of certiorari is filed in the Supreme Court within 30 days from this date.

May 10, 1947.

John J. Parker, Senior Circuit Judge.

[fol. 37] STIPULATION

IN THE SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1946

No. —

MARY BELL KING, Petitioner,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Respondent

Subject to this Court's approval, it is hereby stipulated and agreed, by and between counsel for the respective parties hereto, that for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

1. Appendix to brief of the appellant in the United States Circuit Court of Appeals for the Fourth Circuit.

2. The proceedings had before the United States Circuit Court of Appeals for the Fourth Circuit.

It is further stipulated and agreed that petitioner will cause the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit to file with the Clerk of the Supreme Court a complete certified transcript of the record on appeal in the Circuit Court of Appeals for the Fourth Circuit; and that, in the event that the petition for writ of certiorari is granted, the printed record shall consist of the proceedings in the court below and such portions of the complete transcript of record on appeal in that court as the parties may designate.

It is further stipulated and agreed that either of the parties hereto may refer in its brief to the record filed [fol. 38] in the Supreme Court of the United States.

May —, 1947.

Jesse W. Boyd, Miller C. Foster, Counsel for Petitioner; C. F. Haynsworth, Jr., F. D. Rainey, Counsel for Respondent.

June 4, 1947, petition for further stay of mandate is filed.

ORDER FURTHER STAYING MANDATE—Filed June 6, 1947.

(Style of Court and Title Omitted)

Upon the application of the appellee, by her counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, further stayed pending the application of the Appellee in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for the writ of certiorari is filed in the Supreme Court within 35 days from this date.

June 5th, 1947.

John J. Parker, Senior Circuit Judge.

[fol. 39] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to brief of appellant, and the proceedings in the said Circuit Court of Appeals in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Ap-

peals in said cause, made up in accordance with the stipulation of counsel for the respective parties, for use in the Supreme Court of the United States on application for writ of certiorari.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, this 6th day of June, A. D., 1947.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal.)

[fol. 34] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 35] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed October 31, 1947

Subject to this Court's approval, it is hereby stipulated and agreed, by and between counsel for the respective parties hereto that, a petition for writ of certiorari having been granted, the printed record for further proceedings may consist of the transcript of record used in connection with the petition for a writ of certiorari.

It is further stipulated and agreed that either of the parties hereto may refer in its brief to the record filed in the Supreme Court of the United States.

Jesse W. Boyd, —— ——, [illegible], Attorneys for Petitioner. F. Dean Rainey, C. F. Haynesworth, Jr., Attorneys for Respondents.

October 30th, 1947.

[fol. 36] [File endorsement omitted.]

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 171

MARY BELL KING, *Petitioner,*

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT WITH SUPPORTING BRIEF AND APPENDIX.

JESSE W. BOYD,
MILLER C. FOSTER,
Counsel for Petitioner.

JOHNSON, JOHNSON & FOSTER,
Spartanburg, South Carolina,
Of Counsel.

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Appendix

Mary Bell King v. Commonwealth Life Ins. Co., of Louisville, Ky., Judgment Roll No. 33454, Office of Clerk of Court of Common Pleas, Spartanburg County, S. C. 17-24

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No.

MARY BELL KING, *Petitioner,*

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Mary Bell King, respectfully represents that she is aggrieved by the final judgment and decision of the United States Circuit Court of Appeals for the Fourth Circuit, in an action at law entitled No. 5559, The Order of United Commercial Travelers of America, Appellant, vs. Mary Bell King, Appellee, decided April 9, 1947, and by reason thereof, your Petitioner prays for the allowance of a writ of certiorari to be directed to the United States Circuit Court of Appeals for the Fourth Circuit, in order that the said judgment and decision may be reviewed by your Honorable Court.

I.

Summary Statement of Matter Involved.

This is an action at law, commenced in the Court of Common Pleas, County of Spartanburg, State of South Carolina, in which petitioner, as plaintiff, sought to recover the sum of Five Thousand Dollars ($5,000.00) from respondent, as defendant, a Fraternal Benefit Association, incorporated under the laws of the State of Ohio, upon a policy of insurance issued by it on the life of her husband. By reason of diversity of citizenship and jurisdictional amount, the action was removed by the defendant to the District Court. The case was tried upon an agreed statement of facts by the District Judge, who rendered a decision in favor of the Petitioner for the sum of Five Thousand Dollars ($5,000.00) and interest. (R. 5-20.)

Upon appeal by the Defendant, The Order of United Commercial Travelers of America, to the Circuit Court of Appeals for the Fourth Circuit, that Court, for the reasons stated in its opinion, (R. 24-29), rendered April 9, 1947, reversed the judgment of the lower court. The opinion of the Circuit Court stated that although South Carolina law would be controlling, the highest court in that state has never considered the precise question here involved. (R. 25.)

The Court of Appeals by order of May 10, 1947, stayed its mandate for thirty days (R. 30-31), and thereafter by order until July 10, 1947 (R. 32).

II.

Basis of Jurisdiction of Supreme Court.

Jurisdiction rests upon Section 240-A of the Judicial Code, as amended by Act of Congress of February 13, 1925, 43 Stat. 936, (28 USCA, Sec. 347a), conferring jurisdiction to review any judgment of the Circuit Court of Appeals, and Section 5-b of Rule 38 of the Supreme Court, together with diversity of citizenship and the jurisdictional amount.

III.

Questions Involved.

Has the Circuit Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions in that the Court did not follow the South Carolina laws as declared by the Courts of South Carolina within the requirement of Sec. 34 of the Judiciary Act of 1789, 28 USCA Sec. 725 and of the decision in *Erie R. Co. v. Tompkins*, 304 U. S. 64, and subsequent cases decided by the United States Supreme Court extending and broadening the principle laid down by the Erie case.

IV.

Reasons Relied Upon for Allowance of the Writ.

The insurance policy upon which petitioner brought suit is a South Carolina contract, and the case is governed by the laws of the State of South Carolina. The judgment of the Court of Appeals was arrived at contrary to state law and rules of decision of state courts, including a decision (from which no appeal was taken to the State Supreme Court) of the Court of Common Pleas for the County of Spartanburg, South Carolina, which allowed this very same petitioner to recover on a similar policy with another insurance company on the same statement of fact as was before the Circuit Court of Appeals. A copy of this decision appears in the Appendix. Thus, unless reversed, the decision of the Circuit Court of Appeals furnishes insulation and escape to the respondent, who was able to move the original case against it from the State to the Federal Courts due solely to the circumstance of diversity of citizenship and jurisdictional amount while another insurer, in a case so similar as to be on all fours, which could not move

its case because of insufficient jurisdictional amount is required by a state court to pay.

Respectfully submitted,

MARY BELL KING,
BY JESSE W. BOYD,
Her Attorney.

JESSE W. BOYD,
Spartanburg, South Carolina
MILLER C. FOSTER,
Spartanburg, South Carolina
Counsel for Petitioner.

JOHNSON, JOHNSON & FOSTER,
Spartanburg, South Carolina,
Of Counsel.

SUPPORTING BRIEF.

I.

Index to brief is included in index to petition, *supra*.

II.

The Opinions of the District Court and Court of Appeals.

The opinion of the District Court was filed May 24, 1946, and reported in 65 Fed. Sup. 740.

The opinion of the Circuit Court of Appeals was filed April 9, 1947, and reported in 161 F. 2d 108.

III.

Grounds On Which Supreme Court Jurisdiction is Invoked.

This application is made upon authority of Section 240-a of the Judicial Code as amended by the Act of Congress of February 13, 1925, 43 Stat. 936 (28 USCA, Sec. 347a), and Section 5-b of Rule 38 of this Court, together with diversity of citizenship and jurisdictional amount.

IV.

Statement of Case.

This is an action by petitioner, as beneficiary, to recover on an insurance contract agreeing to pay beneficiary Five Thousand Dollars ($5,000.00) in the event of the death of Drew L. King, her husband, effected solely through external, violent and accidental means. An exclusion clause in the insurance policy provided that "this Order shall not be liable to any person for any benefit for death resulting for participation, as a passenger or otherwise, in aviation or aeronautics."

On February 9, 1943, Drew L. King, the deceased, a Second Lieutenant in the Civil Air Patrol with Coastal Patrol No. 8, was stationed at James Island near Charleston, South Carolina. On the morning of February 9, 1943,

at around 8 A. M. he left his base field as an observer in a land based plane piloted by a First Lieutenant, Clarence Rawls, on a routine coastal patrol flight. Included in the patrol was a second plane piloted by Lieutenant James A. Taylor with Lieutenant K. C. Bates as Observer. All of the above parties were members of the Civil Air Patrol.

About 9:30 A. M. the plane occupied by Rawls and King developed motor trouble and was forced down on the Atlantic Ocean at about thirty miles out from Cape Fear, North Carolina.

At around 9:33 A. M. Taylor and Bates observed the plane on the water, where it had apparently landed in a normal landing attitude. Both Rawls and King were out of the plane and in the water wearing inflated life jackets and neither seemed to Taylor or Bates to have been injured from the landing. Taylor and Bates circled them at an altitude of about fifty feet and could see both men signalling with their arms. They dropped them emergency kits containing whiskey and concentrates and radioed their situation and position to the base. The plane sank within about four minutes after being first observed on the water. Taylor and Bates went up to an altitude of about 500 to 600 feet so that they could keep King and Rawls in sight and continued to circle them for a period of two to two and one-half hours when a shortage of gasoline forced them to head for their base. During this period King was alive.

The two men were picked up by a Navy boat about 2 P. M. both being dead at the time. The bodies were examined by Lieutenant Com. Landis C. Brown (a duly licensed and practicing physician in civil life) of the United States Navy at the Section Base Hospital of Fort Caswell at Southport, North Carolina. He found one or two slight scratches on Lieutenant King's body but found no marks severe enough to be called an injury or considered

a contributory cause of death. His diagnosis as shown in the proof of death furnished by plaintiff to defendant, was "Drowning as a result of exposure in the water after failure of airplane motor." Lt. Com. Brown was not an eyewitness to events leading to the death of King.

Under agreed facts (R. 1-4) and applicable law, the District Court resolved the single issue presented by the case against the respondent by concluding that the proximate cause of the death of the insured was accidental drowning within the terms of the policy; and that his death did not result from participation, as a passenger or otherwise, in aviation or aeronautics, within the meaning of the exclusion provisions of the policy. (R. 20.)

The Circuit Court of Appeals was unable to see how, under the agreed facts, death resulted in any way other than from participation in aviation, and reversed the judgment of the lower court. (R. 26.)

V.

Specification of Errors.

In reversing the judgment of the District Court it is respectfully urged:

1. The Circuit Court of Appeals erred in that it failed and refused to follow state law and rules of decisions of courts of the State of South Carolina; it being undisputed that the insurance certificate involved in this controversy is a South Carolina contract governed and solvable by the laws of South Carolina.

2. The Circuit Court of Appeals erred in refusing to follow a decision of the South Carolina Court of Common Pleas which allowed this very same petitioner, as plaintiff, to recover on a similar policy with another insurance company on the same statement of facts as here involved; this decision being the only one in which any South Carolina Court has passed upon the precise question here involved.

VI.

ARGUMENT.

Specification No. 1.

Under the doctrine of the *Erie Railroad Company vs. Tompkins,* 304 U. S. 64, 78, the law to be applied in this case is the law of the State of South Carolina and it is not a matter of Federal concern whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision. The rules of decision established by judicial decisions of State Courts, as well as those prescribed by statute, are "laws" which, by Sec. 34 of the Judiciary Act of 1789, 1 Stat. at L. 92, Chap. 20, 28 U.S.C.A., Sec. 725, are made "the rules of decision in trials at common law."

In *Bolt v. Life and Casualty Inc. Co.,* 156 S. C. 117, 152 S. E. 766, the defendant claimed that the deceased having been killed while riding a motorcycle, was not covered by a policy which insured against collision of or by any accident to a motor-driven car; the contention of the defendant being that a motorcycle is not a motor-driven car. Mr. Justice Cothran in a dissenting opinion, 152 S. E. 770, stated that in every case he had been able to find, the precise question at issue was decided in favor of the contention of the insurance company that the descriptive term "motor-driven car" did not cover a motorcycle. To this effect he found and cited cases from Massachusetts, Louisiana, New Jersey, New York and North Carolina. The precise question involved was entirely new in South Carolina and the majority of the court (all the other four members) found against the contention of the insurance company, contrary to the overwhelming weight of authority elsewhere.

Commenting on the question as a novel one, Mr. Justice Blease (152 S. E. 767) stated that in considering it, there

are some principles of law, well recognized by our court, which must be kept in mind. In this connection he said:

"An examination of many of our decisions, too numerous to ever refer to here, will disclose that our court has made it the almost universal rule to construe any clause of an insurance policy against the insurer, when there existed the least doubt as to the meaning of the language employed."

In this statement, referred to by the Circuit Court (R. 28) as a "generalized dictum," we think the Supreme Court of South Carolina was announcing a rule of decision established by its judicial decisions, which should have been followed by the Circuit Court. The Circuit Court indicates that its adoption of this rule of decision would have led it to an opposite result to the one reached. Referring to the quoted statement, the Circuit Court said:

"In any event, we believe that the highest court in South Carolina would not make specific application of such a generalized dictum, which, if applied to the facts here, would fly in the face of reason and the very considerable authority that has expressed the view we now follow." (R. 28.)

We cannot discover that any of the "very considerable authority" referred to comes from the courts of South Carolina.

Specification No. 2.

On July 29, 1946, a Court of Common Pleas of South Carolina rendered a decision in the case of *Mary Bell King vs. Commonwealth Life Insurance Company of Louisville, Kentucky,* as evidenced by Judgment Roll Number 33454, Office of the Clerk of Court of Common Pleas of Spartanburg County, South Carolina. This was a case by this petitioner, as plaintiff, involving the death of the same insured as here and was upon a certificate of insurance

promising to pay the plaintiff $2,500.00 upon receipt of proofs of the death of the insured. The exclusion clause of the policy in the Commonwealth case excluded benefits if "the death of the insured resulted from operating or riding in any kind of aircraft * * *" The issues were tried without a jury before Circuit Judge T. S. Sease upon agreed facts, of necessity materially the same as here, and resulted in a decree awarding judgment to the plaintiff from which no appeal to the Supreme Court of South Carolina was taken by the defendant. Copies of this decision were furnished the Circuit Court and it appears in the appendix hereto.

Article 5, Section 15, of the South Carolina Constitution of 1895 provides: "The Courts of Common Pleas shall have * * * jurisdiction in all civil cases. They shall have appellate jurisdiction in all cases within the jurisdiction of inferior Courts, except from such inferior Courts from which the General Assembly shall provide an appeal directly to the Supreme Court." If the amount involved in the King vs. Commonwealth Life case, supra, had been less than One Hundred Dollars ($100.00), it could have been tried in a South Carolina Magistrate Court under the provisions of Section 257, South Carolina Code of Laws, 1942, which reads as follows: "Magistrates shall have civil jurisdiction in the following actions: (1) In actions arising on contracts for the recovery of money only, if the sum claimed does not exceed one hundred dollars." If so tried, the Court of Common Pleas would have had appellate jurisdiction under Section 794, South Carolina Code of Laws, 1942, which is as follows: "When a judgment is rendered by a magistrate's court, * * * the appeal shall be to the circuit court of the county wherein the judgment was rendered * * *" The Court of Common Pleas is a circuit court as provided by Article 5, Section 1 of the

South Carolina Constitution of 1895, which reads as follows: "The judicial power of this State shall be vested in a Supreme Court, in two Circuit Courts, to wit: A Court of Common Pleas having civil jurisdiction and a Court of General Sessions with criminal jurisdiction only * * *"

The Circuit Court of Appeals, referring to the opinion of the Court of Common Pleas in King v. Commonwealth, supra, stated, "That opinion, not binding on other South Carolina courts, is not binding on us and we cannot treat it as a final expression of South Carolina law," citing *Erie Railroad vs. Tompkins*, 304 U. S. 64. (R. 29.)

This leads us to a brief reference to decisions broadening the doctrine announced in Erie Railroad, *supra*. In *West v. American Teleph. and Teleg. Co.*, 311 U. S. 223, 231, the Court said:

"The Circuit Court of Appeals in this case, in which jurisdiction rests exclusively on diversity of citizenship, declined to follow the ruling in *West v. American Teleph. and Teleg. Co.*, 54 Ohio App. 369, 7 N. E. (2d) 805, 7 Ohio Ops. 363, of the Cuyahoga County Court of Appeals, an intermediate appellate court of Ohio. The question for decision is whether, in refusing to follow the rule of law announced by the state court, the court below failed to apply state law within the requirement of Section 34 of the Judiciary Act of (September 24) 1789, 1 Stat. at L. 92, Chap. 20, 28 USCA Section 725 and of our decision in the *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L ed 1188, 58 S. Ct. 817, 114 A. R. L. 1487."

The Court then broadens the doctrine of the Erie Railroad Case, *supra*, by stating, (311 U. S. 236)

"True, as was intimated in the Erie R. Co. Case, the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has

later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. See *Wichita Royalty Co. v. City Nat. Bank*, 306 U. S. 103, 107, 83, L ed 515, 517, 59 S. Ct. 420. But the obvious purpose of Section 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken.

"A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable."

We cannot better stress our opinion that the Circuit Court of Appeals should have followed the King vs. Commonwealth Life case, *supra*, as decided by the Court of Common Pleas, than by quoting the following from *Fidelity Union Trust Co. vs. Field*, 311 U. S. 169, 177, 178, where there was under review a decision of the United States Circuit Court of Appeals for the Third Circuit which had declined to follow decisions of the Chancery Court of New Jersey:

"The Circuit Court of Appeals found it impossible to distinguish the facts in the two Chancery cases from those shown here. The court recognized its duty to follow the law of the State and said that where that law had been

determined by the state court of last resort, its decision must be followed irrespective of the federal court's opinion of what the law ought to be. But the majority of the Circuit Court of Appeals took the view that it was not so bound 'by the pronouncements of other state courts' but might conclude that 'the decision does not truly express the state law.' The court held that the statute of 1932 was 'clearly constitutional and unambiguous' and that 'contrary decisions' of the Chancery Court of New Jersey were not binding. Accordingly, the judgment of the District Court was reversed.

"We think that this ruling was erroneous. The highest state court is the final authority on state law (*Beals v. Hale*, 4 How. (U.S.) 37, 54, 11 L ed 865, 872; *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78, 82 L ed 1188, 1194, 58 S. Ct. 817, 114 A. L. R. 1487), but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State. See *Ruhlin v. New York L. Ins. Co.* 304 U. S. 202, 209, 82 L ed 1290, 58 L ed 860. An intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question. We have declared that principle in *West v. American Teleph. and Teleg. Co.* Nos. 44 and 45, decided this day (311 U. S. 223, post, 139, 61 S. Ct. 179, 132 A. L. R. 956). It is true that in that case an intermediate appellate court of the State had determined the immediate question as between the same parties in a prior suit, and the highest state court had refused to review the lower court's decision, but we set forth the broader principle as applicable to the decision of an intermediate court, in the absence of a decision by the

highest court, whether the question is one of statute or common law." In the Field case, the Court also said: (311 U. S. 178, 179) "At the present time the Thatcher and Travers cases stand as the only exposition of the law of the State with respect to the construction and effect of the statutes of 1932, and the Circuit Court of Appeals was not at liberty to reject these decisions merely because it did not agree with their reasoning."

At the present time, the case of King vs. Commonwealth Insurance Company, *supra*, stands as the only exposition of the law of the State of South Carolina upon the precise question here involved; that is, with respect to the construction and effect of an exclusion clause such as is presently involved as applied to the presently involved facts. The Court of Common Pleas was in complete accord with the able and exhaustive opinion of the District Court in the case here under consideration. The opinion of the Court of Common Pleas (p. 23, post), says: "The District Court held that the death of the insured did not result from participation, as a passenger or otherwise, in aviation or aeronautics, within the meaning of the exclusion provision of the policy and that plaintiff was entitled to recover. I am in agreement with this opinion." Using the exact wording of the District Court opinion, Court of Common Please (p. 24, post) further said: "To bar recovery by the plaintiff in this case, it would be necessary to write some other wording into the exclusion clause involved, which was not written there by the defendant when its policy was issued to Drew L. King.

This very pertinent statement appears in *Fidelity Union Trust Company vs. Field*, 311 U. S. 169, 180, "It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the

circumstance of diversity of citizenship." Unless the judgment of the United States Circuit Court of Appeals for the Fourth District is reversed, that which was above said to be inadmissible will obtain.

Respectfully submitted,

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APPENDIX.

Copy of Decree of Court of Common Pleas Recorded in Office of Clerk of Court for Spartanburg County, South Carolina. Judgment Roll No. 33454.

The defendant in this action is a corporation organized under the laws of one of the States of the Union, and authorized to engage in, and being engaged in the life insurance business in the State of South Carolina. The plaintiff is the beneficiary of an insurance contract entered into by the defendant with the plaintiff's late husband, Drew L. King. Application for the issuance of the insurance policy involved was made at Spartanburg, South Carolina, by the insured and the policy was issued to him there on December 3rd, 1940, and the first semi-annual premium was paid by him at the same time and place. By the terms of its contract as evidenced by its policy of insurance No. 247015, the defendant promised to pay to this plaintiff immediately upon receipt of proofs of the death of the insured the sum of Two Thousand Five Hundred ($2,500.00) Dollars.

Upon agreement by counsel representing the parties, this case was tried before me at the May, 1946, term of the Court of Common Pleas for the County of Spartanburg. The facts were stipulated by the parties, and are as follows:

1. That policy of Defendant, No. 247015, is attached and made "Plaintiff's Exhibit No. 1." The issuance and delivery of same are admitted. The policy was in full force and effect and all premiums paid on the date of the death of the name insured, Drew Lagrone King. The face amount of the policy is Two Thousand Five Hundred and no/100 ($2,500.00) Dollars, with no double indemnity benefits, and the beneficiary named in said policy is the Plaintiff in this action, and a resident of Spartanburg County, South

Carolina. That the Defendant has paid to Plaintiff the reserve value of the policy, which defendant alleges is the only amount due thereunder, without prejudice, however, to Plaintiff's claim for the face amount of the policy.

2. That the policy contained, inter alia, the following provision:

> "This Policy is issued under the express condition that should the death of the Insured result from operating or riding in any kind of aircraft, except as a fare-paying passenger in a licensed passenger aircraft operated by a licensed pilot on a regular passenger route between definitely established airports, the Company's liability hereunder shall be limited, during the first two Policy years, to the return of the premiums which have been received hereunder, without interest, to the Beneficiary, and in the event of such death after the second Policy year, the Company's liability hereunder shall be limited to the reserve value of the policy."

3. The insured died on the 9th day of February, 1943.

4. That at the time of his death and for some time prior thereto, insured was a member of the Civil Air Patrol. The Civil Air Patrol was a branch of and operated under the Office of Civilian Defense. Members of the Civil Air Patrol were paid from funds allocated to the Office of Civilian Defense and could voluntarily resign from such service. Members of the Civil Air Patrol were not eligible for National Service Life Insurance or for benefits provided under the G. I. Bill of Rights. On the morning of February 9, 1943, King left the Charleston Air Base as an observer on a plane piloted by one Rawls, for a routine C. A. P. mission. He was not a fare-paying passenger and the plane was not licensed as a passenger aircraft and was not being operated on a regular passenger route between definitely established airports. The aircraft was a Stinson NC 39429, and was not owned by the United States Gov-

ernment, and was neither designed nor built to take off or land on water. Included in the patrol was a second plane piloted by Lieutenant J. A. Taylor with Lieutenant K. C. Bates as an observer, both of whom were members of the C. A. P.

5. The facts and circumstances surrounding the death of the insured are as follows:

On February 9, 1943, the deceased, a Second Lieutenant in the Civil Air Patrol with Coastal Patrol No. 8 was stationed at James Island near Charleston, South Carolina. On the morning of February 9, 1943, at around 8 A. M. he left his base field as an observer in a plane piloted by a First Lieutenant, Clarence Rawls, on a routine coastal patrol flight. Included in the patrol was a second plane piloted by Lieutenant James A. Taylor, with Lieutenant K. C. Bates as observer.

About 9:30 A. M., the plane occupied by Rawls and King developed motor trouble and was forced down on the Atlantic Ocean at about thirty miles out from Cape Fear, North Carolina.

At around 9:33 A. M., Taylor and Bates observed the plane, which had landed in a normal landing attitude, on the water. The water was very cold at the time and so was the air above it. Both Rawls and King were out of the plane and in the water wearing inflated life jackets and neither seem to Taylor or Bates to have been injured from the landing. Taylor and Bates circled them at an altitude of about fifty feet and could see both men signalling with their arms. They dropped them emergency kits containing whiskey and concentrates and life saving equipment including inflated rubber tubes and radioed their situation and position to the base. The plane sank within about four minutes after being first observed on the water. Taylor and Bates went up to an altitude of about 500 to 600 feet

so that they could keep King and Rawls in sight, and continued to circle them for a period of two to two and one-half hours when a shortage of gasoline forced them to head for their base. During this period King was alive. Immediately after King's plane was forced down on the water a radio alarm was sent out and seventeen Army, Navy and C. A. P. planes, one blimp, two flying boats, and fourteen surface boats were sent out in search for him. Before Taylor and Bates left the scene, Naval search planes flew over the place where King and Rawls were on the water, but apparently failed to see them.

The two men were picked up by a Navy boat about 2 P. M., both being dead at the time. The bodies were examined by Lieutenant Com. Landis C. Brown (a duly licensed and practicing physician in civil life) of the United States Navy at the Section Base Hospital of Fort Caswell at Southport, North Carolina. He found one or two slight scratches on Lieutenant King's body, but found no marks severe enough to be called an injury or considered a contributory cause of death. His diagnosis was "Drowning as a result of exposure in the water." Lt. Com. Brown was not an eyewitness to events leading to the death of King.

6. Final proofs of death were duly submitted to the defendant on the 31st day of March, 1943.

7. If relevant and competent, it is agreed that during prior service as a member of the C. A. P., Lieutenant King had been forced down on the water and remained in the water for a period of five hours prior to his rescue.

Under the agreed facts and applicable law, did the death of the insured result from engaging as a passenger or otherwise in submarine or aeronautic operation?

It has been decided in South Carolina, that cause of death, within the meaning of insurance against death re-

sulting from external, violent and accidental means, is the immediate cause, and not the remote cause *Goethe v. New York Life Ins. Co.*, 183 S. C. 199, 190 S. E. 451. In that case, Goethe died of a heatstroke, following vigorous efforts to put out a fire. On the issue of whether death was the culmination of angina pectoris, a disease, or heatstroke, an accident, the Supreme Court of South Carolina said: "In our opinion, the heatstroke suffered by the insured in the case at bar was in and of itself an accidental means, * * *"

In *Manufacturers' Accident Indemnity Co. v. Dorgan*, (C. C. A. 6) 58 Fed. 945, the deceased, (husband of the plaintiff in that case) was last seen alive fishing in a brook. Twenty minutes later, he was discovered lying in the brook, with his face downward, and submerged in six inches of water, dead. The defendant insurance company contended, and evidence was introduced by it, tending to show that the deceased had suffered from defective action of the heart in its aortic valve. The jury found adversely to defendant's contention, and rendered a verdict for the plaintiff. In affirming the judgment of the district court, Judge Taft said: "The policy provided, as we have already seen, that the benefits under it extended to the death of the insured through external, violent, and accidental means, and that it should not cover accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by or in consequence of fits, vertigo, somnambulism, or any disease existing prior or subsequent to the date of the certificate, or to any cause excepting where the injury was the sole cause of the disability or death. In the application the deceased stated that he was aware that the insurance would not extend to any bodily injury happening, directly or indirectly, in consequence of disease, or to death or disability caused wholly or in part by bodily in-

firmities or disease, or to any case where the accidental injury was not the proximate and sole cause of disability or death."

"It is well settled that an involuntary death by drowning is a death by external, violent, and accidental means. *Trew v. Assurance Company*, 6 Hurl & N. 838; *Winspear v. Insurance Co.*, 7 Q. B. Div. 42; *Reynolds v. Insurance Co.*, 22 Law T. (N. S.) 820.

"We are of the opinion that in the legal sense, and within the meaning of the last clause, *if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into.* The disease would be but the condition; the drowning would be the moving, sole, and proximate cause.

In the case of *Tierney v. Occidental Life Ins. Co.*, 89 Cal. App. 779, 265 P. 400, there was for construction by the court an exclusion clause reading: "This policy does not cover any injury * * * sustained * * * while participating or in consequence of having participated in aeronautics." In construing the words "in consequence," the court distinguished between "sequence" and "in consequence." The court held that recovery upon an insurance contract might be had by the beneficiary of an insured who was killed by stepping into a whirling airplane propeller after, having been a passenger on an airplane, he had climbed from the plane to the ground. I quote excerpts from the opinion in which that court asked and answered some very pertinent questions. The court said: "Was the death caused 'in consequence of the insured's having participated in aeronautics?' He had so participated and he met his death. Was

the death caused in consequence thereof? The death was a sequence of the participation, that is, it followed closely and was connected therewith, but was it in consequence thereof? Did the participation cause the death? . . . Did the accident happen as the result of or because of that which is now past, 'having participated in aeronautics?' Did the participation cause the death?" The court not only asked all of the above questions but in construing the meaning of the exclusion clause answered all of these questions in favor of the insured and against the insurer, and in the course of the opinion said: "At first blush, the flight and the accident being so close together, one is apt to confuse the meaning of 'sequence' and 'in consequence'."

The case of *Mary Bell King v. The Order of United Commercial Travelers of America,*——Federal Supplement——, was a case by this same plaintiff involving the death of the same insured as here, and was upon a certificate of insurance promising to pay the beneficiary the sum of Five Thousand Dollars ($5,000.00) upon receipt of due proof of the death of the insured effected solely through external, violent, and accidental means, but excepted the risk of death resulting from participation as a passenger or otherwise in aviation or aeronautics. The District Court held that the death of the insured did not result from participation, as a passenger or otherwise, in aviation or aeronautics, within the meaning of the exclusive provision of the policy and that plaintiff was entitled to recover. I am in agreement with this opinion. In the case before me, it appears that Lieutenant King arrived by way of aircraft at the place where he was later accidentally drowned, but he was not injured in the arrival or in leaving the plane which had brought him there. He left the plane uninjured and wearing an inflated life jacket. The plane had not crashed, but had landed on the water in a normal landing

attitude and sank within a few minutes after its landing. At the time the plane sank, King was alive and uninjured and had the protection of an inflated life jacket, which he was wearing. He was known to have been alive for a period of two and one-half hours thereafter when shortage of gasoline in another plane piloted by a Lieutenant Taylor, who had kept King in sight, forced Taylor to return to his base.

To bar recovery by the plaintiff in this case, it would be necessary to write some other wording into the exclusion clause involved, which was not written there by the defendant when its policy was issued to Drew L. King. I conclude that disengagement from participation in aviation or aeronautics had taken place, and that King's service, travel and flight in the aircraft had definitely ended more than two hours after his death. The only connection King had with the plane at the time he met his death by drowning was that he had arrived by plane at a place near where he was drowned. His death was the result of accidental drowning.

It Is Therefore Ordered, Adjudged and Decreed that the plaintiff have judgment against the defendant in the sum of Two Thousand Five Hundred ($2,500.00) Dollars with interest at six per cent (6%) from the thirty-first day of March, 1943, which judgment shall be credited with the amount already paid to plaintiff as the reserve value of the policy, with interest from date of payment.

T. S. Sease,
Judge of Seventh Judicial Circuit.

July 29, 1946.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 171

MARY BELL KING, *Petitioner,*

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

BRIEF FOR PETITIONER

JESSE W. BOYD,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 171

MARY BELL KING, *Petitioner,*

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

BRIEF FOR PETITIONER

REPORT OF THE OPINIONS IN THE DISTRICT AND CIRCUIT COURTS.

The opinion of the District Court, dated May 24, 1946, is reported in 65 Federal Supplement, page 740.

The opinion of the Circuit Court of Appeals, dated April 9, 1947, is reported in 161 Federal Second, page 108.

GROUNDS OF JURISDICTION.

Jurisdiction rests upon Section 240-A of the Judicial Code, as amended by Act of Congress of February 13, 1925, 43 Stat. 936, (28 USCA, Sec. 347a), conferring jurisdiction to review any judgment of the Circuit Court of Appeals, and Section 5-b of Rule 38 of the Supreme Court, together with diversity of citizenship and the jurisdictional amount.

STATEMENT OF CASE.

This is an action at law, commenced in the Court of Common Pleas, County of Spartanburg, State of South Carolina, in which petitioner, as plaintiff, sought to recover the sum of Five Thousand Dollars ($5,000.00) from respondent, as defendant, a Fraternal Benefit Association, incorporated under the laws of the State of Ohio, upon a policy of insurance issued by it on the life of her husband. By reason of diversity of citizenship and jurisdictional amount, the action was removed by the defendant to the District Court. The case was tried upon an agreed statement of facts by the District Judge, who rendered a decision in favor of the petitioner for the sum of Five Thousand Dollars ($5,000.00) and interest. (R. 5-20.)

Upon appeal by the Defendant, The Order of United Commercial Travelers of America, to the Circuit Court of Appeals for the Fourth Circuit, that Court, for the reasons stated in its opinion, (R. 24-29), rendered April 9, 1947, reversed the judgment of the lower court. The opinion of the Circuit Court stated that although South Carolina law would be controlling, the highest court in that state has never considered the precise question here involved. (R. 25.)

Certiorari to the Circuit Court of Appeals was granted October 13, 1947.

The action is on an insurance contract agreeing to pay beneficiary Five Thousand Dollars ($5,000.00) in the event of the death of Drew L. King, her husband, effected solely through external, violent and accidental means. An exclusion clause in the insurance policy provided that "this Order shall not be liable to any person for any benefit for death resulting from participation, as a passenger or otherwise, in aviation or aeronautics."

On February 9, 1943, Drew L. King, the deceased, a Second Lieutenant in the Civil Air Patrol with Coastal Patrol No. 8, was stationed at James Island near Charles-

ton, South Carolina. On the morning of February 9, 1943, at around 8 A. M. he left his base field as an observer in a land based plane piloted by a First Lieutenant, Clarence Rawls, on a routine coastal patrol flight. Included in the patrol was a second plane piloted by Lieutenant James A. Taylor, with Lieutenant K. C. Bates as observer. All of the above parties were members of the Civil Air Patrol.

About 9:30 A. M. the plane occupied by Rawls and King developed motor trouble and was forced down on the Atlantic Ocean at about thirty miles out from Cape Fear, North Carolina.

At around 9:33 A. M. Taylor and Bates observed the plane on the water, where it had apparently landed in a normal landing attitude. Both Rawls and King were out of the plane and in the water, wearing inflated life jackets, and neither seemed to Taylor or Bates to have been injured from the landing. Taylor and Bates circled them at an altitude of about fifty feet and could see both men signalling with their arms. They dropped them emergency kits containing whiskey and concentrates and radioed their situation and position to the base. The plane sank within about four minutes after being first observed on the water. Taylor and Bates went up to an altitude of about 500 to 600 feet so that they could keep King and Rawls in sight and continued to circle them for a period of two to two and one-half hours, when a shortage of gasoline forced them to head for their base. During this period King was alive.

The two men were picked up by a Navy boat about 2 P. M. both being dead at the time. The bodies were examined by Lieutenant Com. Landis C. Brown (a duly licensed and practicing physician in civil life) of the United States Navy at the Section Base Hospital of Fort Caswell at Southport, North Carolina. He found one or two slight scratches on Lieutenant King's body but found no marks severe enough to be called an injury or considered a contributory cause of death. His diagnosis as shown in the

proof of death furnished by plaintiff to defendant, was "Drowning as a result of exposure in the water after failure of airplane motor." Lt. Com. Brown was not an eyewitness to events leading to the death of King.

The single issue presented by this case is whether or not the deceased's death fell within the exemption provided in the contract of insurance which reads as follows: "This Order shall not be liable to any person for any benefit for death resulting from participation, as a passenger or otherwise, in aviation or aeronautics, (except as a fare-paying passenger in a licensed aircraft operated on a regular schedule)," it being conceded that in making the trip from the base field at James Island on February 9, 1943, he was not a fare-paying passenger on a licensed aircraft operated on a regular schedule.

SPECIFICATION OF ERRORS.

In reversing the judgment of the District Court it is respectfully urged:

1. The Circuit Court of Appeals erred in that it failed and refused to follow state law and rules of decisions of courts of the State of South Carolina; it being undisputed that the insurance certificate involved in this controversy is a South Carolina contract governed and solvable by the laws of South Carolina.

2. The Circuit Court of Appeals erred in refusing to follow a decision of the South Carolina Court of Common Pleas which allowed this very same petitioner, as plaintiff, to recover on a similar policy with another insurance company on the same statement of facts as here involved; this decision being the only one in which any South Carolina Court has passed upon the precise question here involved.

ARGUMENT.

Specification No. 1.

The District Court found under the Conclusions of Law (R. 4) as its first finding that "The contract of insurance in this controversy is a South Carolina contract, and it must be governed, solved and construed by laws of this State." From this finding, the respondent took no exception in its appeal to the Circuit Court of Appeals, and is now, therefore, bound by that finding. The Circuit Court of Appeals likewise found that South Carolina law would be controlling. (R. 25.)

Under the doctrine of the *Erie Railroad Company vs. Tompkins*, 304 U. S. 64, 78, the law to be applied in this case is the law of the State of South Carolina and it is not a matter of Federal concern whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision. The rules of decision established by judicial decisions of State Courts, as well as those prescribed by statute, are "laws" which, by Sec. 34 of the Judiciary Act of 1789, 1 Stat. at L. 92, Chap. 20, 28 U.S.C.A., Sec. 725, are made "the rules of decision in trials at common law."

In *Bolt v. Life and Casualty Ins. Co.*, 156 S. C. 117, 152 S. E. 766, the defendant claimed that the deceased having been killed while riding a motorcycle, was not covered by a policy which insured against collision of or by any accident to a motor-driven car; the contention of the defendant being that a motorcycle is not a motor-driven car. Mr. Justice Cothran in a dissenting opinion, 152 S. E. 770, stated that in every case he had been able to find, the precise question at issue was decided in favor of the contention of the insurance company that the descriptive term "motor-driven car" did not cover a motorcycle. To this effect, he found and cited cases from Massachusetts, Louisiana, New Jersey, New York and North Carolina. The precise

question involved was entirely new in South Carolina and the majority of the court (all the other four members) found against the contention of the insurance company, contrary to the overwhelming weight of authority elsewhere.

Commenting on the question as a novel one, Mr. Justice Blease (152 S. E. 767) stated that in considering it, there are some principles of law, well recognized by our court, which must be kept in mind. In this connection, he said:

"An examination of many of our decisions, too numerous to even refer to here, will disclose that our court has made it the almost universal rule to construe any clause of an insurance policy against the insurer, when there existed the least doubt as to the meaning of the language employed."

In this statement, referred to by the Circuit Court (R. 28) as a "generalized dictum," we think the Supreme Court of South Carolina was announcing a rule of decision established by its judicial decisions, which should have been followed by the Circuit Court. The Circuit Court indicates that its adoption of this rule of decision would have led it to an opposite result to the one reached. Referring to the quoted statement, the Circuit Court said:

"In any event, we believe that the highest court in South Carolina would not make specific application of such a generalized dictum, which, if applied to the facts here, would fly in the face of reason and the very considerable authority that has expressed the view we now follow." (R. 28.)

We cannot discover that any of the "very considerable authority" referred to comes from the courts of South Carolina.

The Circuit Court said, in its opinion: "Out of the abundance of wisdom that comes with hindsight, it might have been better to also have inserted the words 'directly or indirectly' in the exclusion clause." (R. 26.) The quoted

words are not in the exclusion clause. If it would have been better to have inserted them, surely their absence creates some doubt whether the exclusion clause, as written, absolves the insurer and whether the common man would have understood under the agreed facts of this case that the death of King "resulted" from participation in aviation or aeronautics.

It is the conclusively settled law in South Carolina (nothwithstanding the adoption of a contrary rule in other jurisdictions) that the cause of death within the meaning of insurance against death resulting from external, violent and accidental means is the immediate cause and not the remote cause. *Goethe v. New York Life Insurance Company*, 183 S. C. 199, 190 S. E. 451. Goethe died of a heatstroke following vigorous efforts to put out a fire. On the issue of whether death was the culmination of angina pectoris, a disease, or a heatstroke, an accident, the Court said: "In our opinion, the heatstroke suffered by the insured in the case at bar was in and of itself an accidental means, * * *. Accident insurance companies do business mostly with common people, and the term 'accident' as used in these policies should be defined according to the ordinary and usual understanding of its signification." When the language in the instant contract is so defined and interpreted, in the light of agreed facts, it seems clear that there is doubt that the meaning of the language used absolves the insurer. We submit in reason that the common man, reading the exclusion proviso in the policy here under consideration, would not think or understand the exclusion proviso to be applicable in the situation presented by the facts of this case.

Because of analogous facts, the reasoning of Circuit Judge Taft, later Chief Justice of the Supreme Court, in the decision of the Circuit Court of Appeals of the Sixth Circuit in the case of *Manufacturers Accident Indemnity Company v. Dorgan*, 58 Fed. 945, is peculiarly applicable to the case here involved. In the Dorgan case, the insured

was last seen alive fishing in a brook. Twenty minutes later he was discovered lying in the brook with his face downward, submerged in six inches of water, dead. The defendant insurance company contended, and evidence was introduced by it, tending to show that the deceased had suffered from defective action of the heart in its aortic valve. The jury found adversely to the defendant's contention and rendered a verdict against it. In affirming the judgment of the District Court, Judge Taft said:

"The policy provided, as we have already seen, that the benefits under it extended to the death of the insured through external, violent, and accidental means, and that it should not cover accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by or in consequence of fits, vertigo, somnambulism, or any disease existing prior or subsequent to the date of the certificate, or to any cause excepting where the injury was the sole cause of the disability or death. In the application the deceased stated that he was aware that the insurance would not extend to 'any bodily injury happening directly or indirectly, in consequence of disease, or to death or disability caused wholly or in part by bodily infirmities or disease, or to any case where the accidental injury was not the proximate and sole cause of disability or death.' * * * We are of the opinion that in the legal sense, and within the meaning of the last clause, if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole and proximate cause."

"Insurance policies are drawn by legal advisers of the insurance company who study with care the decisions of the court, and, with such decisions in mind, attempt to

limit as nearly as possible the scope of insurance. It is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurance company."

The exclusion clause in the policy here involved does not have in it the word "indirectly," or any word or phrase of similar import, and as logically said in the opinion of the District Court: "To bar recovery by the plaintiff in this case, it would be necessary to write some other wording into the exclusion clause involved which was not written there by the insurance company when its policy was issued to the insured." (R. 19).

In connection with the statement of Judge Taft in the Dorgan case, supra, to the effect that disease would be but the condition, and that drowning would be the moving, sole and proximate cause, we desire to call attention to the South Carolina cases of *Young v. Life & Casualty Insurance Co.*, 204 S. C. 386, 29 S. E. (2d) 482, and *McGee v. Globe Indemnity Co.*, 173 S. C. 380, 175 S. E. 849. In sustaining recovery for death of a soldier in an automobile accident while on furlough, even though the exclusion clause of the policy excluded liability * * * "if death results from bodily injuries, sustained * * * while the insured is in the military or naval service in time of war," the court stated in the Young case that the status or condition theory had been denied in previous South Carolina cases involving insurance clauses. In the McGee case, supra, it was held that a provision in the policy indemnifying the owner of the automobile against loss or damage to his car, which should not apply while the car was used by any person in violation of law as to age, or by any person under the age of 16 years, did not relieve the insurer of liability for an accident although the operator of the car at the time was under 16 years of age. The insurer specifically raised without success the question of status or condition.

The Circuit Court of Appeals of the Tenth Circuit in the case of *Aetna Life Ins. Co., Hartford, Conn., v. Conway,*

102 Fed. (2d) 743, quotes with approval the following from the decision in the case of *Meyer v. Fidelity & Casualty Co. of New York*, 96 Iowa 378, 65 N. W. 328, 300, 59 Am. St. Rep. 374: "It seems to be a well-settled rule in insurance law to attribute an injury or loss to its proximate cause only; and, if this be true, the disorder, whatever it may have been, was but a condition, the fall being the sole and proximate cause of the injury. Lord Bacon's maxim that 'it were infinite for the law to judge the cause of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree,' . . . seems to apply to this character of cases." (Citing *Manufacturers' Accident Ins. Co. v. Dorgan*, supra.)

Specification No. 2.

On July 29, 1946, a Court of Common Pleas of South Carolina rendered a decision in the case of *Mary Bell King vs. Commonwealth Life Insurance Company of Louisville, Kentucky*, as evidenced by Judgment Roll Number 33454, Office of the Clerk of Court of Common Pleas of Spartanburg County, South Carolina. This was a case by this petitioner, as plaintiff, involving the death of the same insured as here and was upon a certificate of insurance promising to pay the plaintiff $2,500.00 upon receipt of proofs of the death of the insured. The exclusion clause of the policy in the Commonwealth case excluded benefits if "the death of the insured resulted from operating or riding in any kind of aircraft * * *." The issues were tried without a jury before Circuit Judge T. S. Sease upon agreed facts, of necessity materially the same as here, and resulted in a decree awarding judgment to the plaintiff from which no appeal to the Supreme Court of South Carolina was taken by the defendant. Copies of this decision were furnished the Circuit Court and it appears in the appendix hereto.

Article 5, Section 15, of the South Carolina Constitution of 1895 provides: "The Courts of Common Pleas shall have • • • jurisdiction in all civil cases. They shall have appellate jurisdiction in all cases within the jurisdiction of inferior Courts, except from such inferior Courts from which the General Assembly shall provide an appeal directly to the Supreme Court." If the amount involved in the King vs. Commonwealth Life case, supra, had been less than One Hundred Dollars ($100.00), it could have been tried in a South Carolina Magistrate Court under the provisions of Section 257, South Carolina Code of Laws, 1942, which reads as follows: "Magistrates shall have civil jurisdiction in the following actions: (1) In actions arising on contracts for the recovery of money only, if the sum claimed does not exceed one hundred dollars." If so tried, the Court of Common Pleas would have had appellate jurisdiction under Section 794, South Carolina Code of Laws, 1942, which is as follows: "When a judgment is rendered by a magistrate's court, • • • the appeal shall be to the circuit court of the county wherein the judgment was rendered • • •." The Court of Common Pleas is a circuit court as provided by Article 5, Section 1 of the South Carolina Constitution of 1895, which reads as follows: "The judicial power of this State shall be vested in a Supreme Court, in two Circuit Courts, to wit: A Court of Common Pleas having civil jurisdiction and a Court of General Sessions with criminal jurisdiction only • • •."

The Circuit Court of Appeals, referring to the opinion of the Court of Common Pleas in King v. Commonwealth, supra, stated, "That opinion, not binding on other South Carolina courts, is not binding on us and we cannot treat it as a final expression of South Carolina law," citing *Erie Railroad vs. Tompkins*, 304 U. S. 64. (R. 29.)

This leads us to a brief reference to decisions broadening the doctrine announced in Erie Railroad, supra. In *West v. American Teleph. and Teleg. Co.*, 311 U. S. 223, 231, the Court said:

"The Circuit Court of Appeals in this case, in which

jurisdiction rests exclusively on diversity of citizenship, declined to follow the ruling in *West v. American Teleph. and Teleg. Co.*, 54 Ohio App. 369, 7 N. E. (2d) 805, 7 Ohio Ops. 363, of the Cuyahoga County Court of Appeals, an intermediate appellate court of Ohio. The question for decision is whether, in refusing to follow the rule of law announced by the state court, the court below failed to apply state law within the requirement of Section 34 of the Judiciary Act of (September 24) 1789, 1 Stat. at L. 92, Chap. 20, 28 U.S.C.A., Section 725, and of our decision in the *Erie R. Co. vs. Tompkins*, 304 U. S. 64, 82 L ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487."

The Court then broadens the doctrine of the Erie Railroad Case, supra, by stating, (311 U. S. 236):

"True, as was intimated in the Erie R. Co. Case, the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited, or restricted. See *Wichita Royalty Co. v. City Nat. Bank*, 306 U. S. 103, 107, 83 L ed. 515, 517, 59 S. Ct. 420. But the obvious purpose of Section 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken.

"A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state, although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the

sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable."

We cannot better stress our opinion that the Circuit Court of Appeals should have followed the King vs. Commonwealth Life case, supra, as decided by the Court of Common Pleas, than by quoting the following from *Fidelity Union Trust Co. vs. Field*, 311 U. S. 169, 177, 178, where there was under review a decision of the United States Circuit Court of Appeals for the Third Circuit which had declined to follow decisions of the Chancery Court of New Jersey:

"The Circuit Court of Appeals found it impossible to distinguish the facts in the two Chancery cases from those shown here. The court recognized its duty to follow the law of the State and said that where that law had been determined by the state court of last resort, its decision must be followed irrespective of the federal court's opinion of what the law ought to be. But the majority of the Circuit Court of Appeals took the view that it was not so bound 'by the pronouncements of other state courts' but might conclude that 'the decision does not truly express the state law.' The court held that the statute of 1932 was 'clearly consitutional and unambiguous' and that 'contrary decisions' of the Chancery Court of New Jersey were not binding. Accordingly, the judgment of the District Court was reversed.

"We think that this ruling was erroneous. The highest state court is the final authority on state law (Beals v. Hale, 4 How. (U. S.) 37, 54, 11 L ed. 865, 872; *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78, 82 Led. 1188, 1194, 58 S. Ct. 817, 114 A. R. L. 1487), but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State. See *Ruhlin v. New York L. Ins. Co.*, 304 U. S. 202, 209, 82 L ed. 1295, 58 L ed. 860. An intermediate state court in declaring and ap-

plying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question. We have declared that principle in *West v. American Teleph. and Teleg. Co.*, Nos. 44 and 45, decided this day (311 U. S. 223, post, 139, 61 S. Ct. 179, 132 A. R. L. 956). It is true that in that case an intermediate appellate court of the State had determined the immediate question as between the same parties in a prior suit, and the highest state court had refused to review the lower court's decision, but we set forth the broader principle as applicable to the decision of an intermediate court, in the absence of a decision by the highest court, whether the question is one of statute or common law."

We cannot and do not say that the Supreme Court of South Carolina or the Circuit Court or the United States Supreme Court is bound by a decision of a South Carolina Court of Common Pleas. But we do urge that the true rule with reference to the effect of the decision of the Court of Common Pleas is laid down by the Field case, supra, when it was said that an intermediate state court in declaring and applying the state law is acting as an organ of the state *and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.* (Emphasis added.)

In the Field case, the Court also said: (311 U. S. 178, 179) "At the present time the Thatcher and Travers cases stand as the only exposition of the law of the State with respect to the construction and effect of the statutes of 1932, and the Circuit Court of Appeals was not at liberty to reject these decisions merely because it did not agree with their reasoning."

At the present time, the case of King vs. Commonwealth Insurance Company, supra, stands as the only exposition of the law of the State of South Carolina upon the precise question here involved; that is, with respect to the con-

struction and effect of an exclusion clause such as is presently involved as applied to the presently involved facts. The Court of Common Pleas was in complete accord with the able and exhaustive opinion of the District Court in the case here under consideration. The opinion of the Court of Common Pleas (p. 22, post), says: "The District Court held that the death of the insured did not result from participation, as a passenger or otherwise, in aviation or aeronautics, within the meaning of the exclusion provision of the policy and that plaintiff was entitled to recover. I am in agreement with this opinion." Using the exact wording of the District Court opinion, Court of Common Pleas (p. 22, post) further said: "To bar recovery by the plaintiff in this case, it would be necessary to write some other wording into the exclusion clause involved, which was not written there by the defendant when its policy was issued to Drew L. King."

This very pertinent statement appears in *Fidelity Union Trust Company vs. Field*, 311 U. S. 169, 180, "It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship." Unless the judgment of the United States Circuit Court of Appeals for the Fourth District is reversed, that which was above said to be inadmissible will obtain.

Respectfully submitted,

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APPENDIX.

Copy of Decree of Court of Common Pleas Recorded in Office of Clerk of Court for Spartanburg County, South Carolina. Judgment Roll No. 33454.

The defendant in this action is a corporation organized under the laws of one of the States of the Union, and authorized to engage in, and being engaged in the life insurance business in the State of South Carolina. The plaintiff is the beneficiary of an insurance contract entered into by the defendant with the plaintiff's late husband, Drew L. King. Application for the issuance of the insurance policy involved was made at Spartanburg, South Carolina, by the insured and the policy was issued to him there on December 3rd, 1940, and the first semi-annual premium was paid by him at the same time and place. By the terms of its contract as evidenced by its policy of insurance No. 247015, the defendant promised to pay to this plaintiff immediately upon receipt of proofs of the death of the insured the sum of Two Thousand Five Hundred ($2,500.00) Dollars.

Upon agreement by counsel representing the parties, this case was tried before me at the May, 1946, term of the Court of Common Pleas for the County of Spartanburg. The facts were stipulated by the parties, and are as follows:

1. That policy of Defendant, No. 247015, is attached and made "Plaintiff's Exhibit No. 1." The issuance and delivery of same are admitted. The policy was in full force and effect and all premiums paid on the date of the death of the name insured, Drew Lagrone King. The face amount of the policy is Two Thousand Five Hundred and no/100 ($2,500.00) Dollars, with no double indemnity benefits, and the beneficiary named in said policy is the Plaintiff in this action, and a resident of Spartanburg County, South Carolina. That the Defendant has paid to Plaintiff the reserve value of the policy, which defendant alleges is the

only amount due thereunder, without prejudice, however, to Plaintiff's claim for the face amount of the policy.

2. That the policy contained, inter alia, the following provision:

> "This Policy is issued under the express condition that should the death of the Insured result from operating or riding in any kind of aircraft, except as a fare-paying passenger in a licensed passenger aircraft operated by a licensed pilot on a regular passenger route between definitely established airports, the Company's liability hereunder shall be limited, during the first two Policy years, to the return of the premiums which have been received hereunder, without interest, to the Beneficiary, and in the event of such death after the second Policy year, the Company's liability hereunder shall be limited to the reserve value of the policy."

3. The insured died on the 9th day of February, 1943.

4. That at the time of his death and for some time prior thereto, insured was a member of the Civil Air Patrol. The Civil Air Patrol was a branch of and operated under the Office of Civilian Defense. Members of the Civil Air Patrol were paid from funds allocated to the Office of Civilian Defense and could voluntarily resign from such service. Members of the Civil Air Patrol were not eligible for National Service Life Insurance or for benefits provided under the G. I. Bill of Rights. On the morning of February 9, 1943, King left the Charleston Air Base as an observer on a plane piloted by one Rawls, for a routine C. A. P. mission. He was not a fare-paying passenger and the plane was not licensed as a passenger aircraft and was not being operated on a regular passenger route between definitely established airports. The aircraft was a Stinson NC 39429, and was not owned by the United States Government, and was neither designed nor built to take off or land on water. Included in the patrol was a second plane piloted by Lieutenant J. A. Taylor with Lieutenant K. C.

Bates as an observer, both of whom were members of the C. A. P.

5. The facts and circumstances surrounding the death of the insured are as follows:

On February 9, 1943, the deceased, a Second Lieutenant in the Civil Air Patrol with Coastal Patrol No. 8, was stationed at James Island near Charleston, South Carolina. On the morning of February 9, 1943, at around 8 A. M. he left his base field as an observer in a plane piloted by a First Lieutenant, Clarence Rawls, on a routine coastal patrol flight. Included in the patrol was a second plane piloted by Lieutenant James A. Taylor, with Lieutenant K. C. Bates as observer.

About 9:30 A. M., the plane occupied by Rawls and King developed motor trouble and was forced down on the Atlantic Ocean at about thirty miles out from Cape Fear, North Carolina.

At around 9:33 A. M., Taylor and Bates observed the plane, which had landed in a normal landing attitude, on the water. The water was very cold at the time and so was the air above it. Both Rawls and King were out of the plane and in the water, wearing inflated life jackets, and neither seem to Taylor or Bates to have been injured from the landing. Taylor and Bates circled them at an altitude of about fifty feet and could see both men signalling with their arms. They dropped them emergency kits containing whiskey and concentrates and life saving equipment including inflated rubber tubes and radioed their situation and position to the base. The plane sank within about four minutes after being first observed on the water. Taylor and Bates went up to an altitude of about 500 to 600 feet so that they could keep King and Rawls in sight, and continued to circle them for a period of two to two and one half hours when a shortage of gasoline forced them to head for their base. During this period King was alive. Immediately after King's plane was forced down on the water

a radio alarm was sent out and seventeen Army, Navy and C. A. P. planes, one blimp, two flying boats, and fourteen surface boats were sent out in search for him. Before Taylor and Bates left the scene, Naval search planes flew over the place where King and Rawls were on the water, but apparently failed to see them.

The two men were picked up by a Navy boat about 2 P. M., both being dead at the time. The bodies were examined by Lieutenant Com. Landis C. Brown (a duly licensed and practicing physician in civil life) of the United States Navy at the Section Base Hospital of Fort Caswell at Southport, North Carolina. He found one or two slight scratches on Lieutenant King's body, but found no marks severe enough to be called an injury or considered a contributory cause of death. His diagnosis was "Drowning as a result of exposure in the water." Lt. Com. Brown was not an eyewitness to events leading to the death of King.

6. Final proofs of death were duly submitted to the defendant on the 31st day of March, 1943.

7. If relevant and competent, it is agreed that during prior service as a member of the C. A. P., Lieutenant King had been forced down on the water and remained in the water for a period of five hours prior to his rescue.

Under the agreed facts and applicable law, did the death of the insured result from engaging as a passenger or otherwise in submarine or aeronautic operation?

It has been decided in South Carolina, that cause of death, within the meaning of insurance against death resulting from external, violent and accidental means, is the immediate cause, and not the remote cause. *Goethe v. New York Life Ins. Co.*, 183 S. C. 199, 190 S. E. 451. In that case, Goethe died of a heatstroke, following vigorous efforts to put out a fire. On the issue of whether death was the culmination of agina pectoris, a disease, or heatstroke, an accident, the Supreme Court of South Carolina said:

"In our opinion, the heatstroke suffered by the insured in the case at bar was in and of itself an accidental means, * * *."

In *Manufacturers' Accident Indemnity Co. v. Dorgan*, (C. C. A. 6) 58 Fed. 945, the deceased, (husband of the plaintiff in that case) was last seen alive fishing in a brook. Twenty minutes later, he was discovered lying in the brook, with his face downward, and submerged in six inches of water, dead. The defendant insurance company contended, and evidence was introduced by it, tending to show that the deceased had suffered from defective action of the heart in its aortic valve. The jury found adversely to defendant's contention, and rendered a verdict for the plaintiff. In affirming the judgment of the district court, Judge Taft said: "The policy provided, as we have already seen, that the benefits under it extended to the death of the insured through external, violent, and accidental means, and that it should not cover accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by or in consequence of fits, vertigo, somnambulism, or any disease existing prior or subsequent to the date of the certificate, or to any cause excepting where the injury was the sole cause of the disability or death. In the application the deceased stated that he was aware that the insurance would not extend to any bodily injury happening, directly or indirectly, in consequence of disease, or to death or disability caused wholly or in part by bodily infirmities or disease, or to any case where the accidental injury was not the proximate and sole cause of disability or death."

"It is well settled that an involuntary death by drowning is a death by external, violent, and accidental means. *Trew v. Assurance Company*, 6 Hurl & N. 838; *Winspear v. Insurance Co.*, 7 Q. B. Div. 42; *Reynolds v. Insurance Co.*, 22 Law T. (N. S.) 820.

"We are of the opinion that in the legal sense, and within the meaning of the last clause, *if the deceased suf-*

fered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole, and proximate cause.".

In the case of *Tierney v. Occidental Life Ins. Co.*, 89 Cal. App. 779, 265 P. 400, there was for construction by the court an exclusion clause reading: "This policy does not cover any injury • • • sustained • • • while participating or in consequence of having participated in aeronautics." In construing the words "in consequence," the court distinguished between "sequence" and "in consequence." The court held that recovery upon an insurance contract might be had by the beneficiary of an insured who was killed by stepping into a whirling airplane propeller after, having been a passenger on an airplane, he had climbed from the plane to the ground. I quote excerpts from the opinion in which that court asked and answered some very pertinent questions. The court said: "Was the death caused 'in consequence of the insured's having participated in aeronautics?' He had so participated and he met his death. Was the death caused in consequence thereof? The death was a sequence of the participation, that is, it followed closely and was connected therewith, but was it in consequence thereof? Did the participation cause the death? . . . Did the accident happen as the result of or because of that which is now past, 'having participated in aeronautics?' Did the participation cause the death?" The court not only asked all of the above questions but in construing the meaning of the exclusion clause answered all of these questions in favor of the insured and against the insurer, and in the course of the opinion said: "At first blush, the flight and the accident being so close together, one is apt to confuse the meaning of 'sequence' and 'in consequence'."

The case of *Mary Bell King v. The Order of United Commercial Travelers of America*, ——Federal Supplement——, was a case by this same plaintiff involving the death of the same insured as here, and was upon a certificate of insurance promising to pay the beneficiary the sum of Five Thousand Dollars ($5,000.00) upon receipt of due proof of the death of the insured effected solely through external, violent, and accidental means, but excepted the risk of death resulting from participation as a passenger or otherwise in aviation or aeronautics. The District Court held that the death of the insured did not result from participation, as a passenger or otherwise, in aviation or aeronautics, within the meaning of the exclusive provision of the policy and that plaintiff was entitled to recover. I am in agreement with this opinion. In the case before me, it appears that Lieutenant King arrived by way of aircraft at the place where he was later accidentally drowned, but he was not injured in the arrival or in leaving the plane which had brought him there. He left the plane uninjured and wearing an inflated life jacket. The plane had not crashed, but had landed on the water in a normal landing attitude and sank within a few minutes after its landing. At the time the plane sank, King was alive and uninjured and had the protection of an inflated life jacket, which he was wearing. He was known to have been alive for a period of two and one-half hours thereafter when shortage of gasoline in another plane piloted by a Lieutenant Taylor, who had kept King in sight, forced Taylor to return to his base.

To bar recovery by the plaintiff in this case, it would be necessary to write some other wording into the exclusion clause involved, which was not written there by the defendant when its policy was issued to Drew L. King. I conclude that disengagement from participation in aviation or aeronautics had taken place, and that King's service, travel and flight in the aircraft had definitely ended more than two hours after his death. The only connection King had

with the plane at the time he met his death by drowning was that he had arrived by plane at a place near where he was drowned. His death was the result of accidental drowning.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have judgment against the defendant in the sum of Two Thousand Five Hundred ($2,500.00) Dollars with interest at six per cent (6%) from the thirty-first day of March, 1942, which judgment shall be credited with the amount already paid to plaintiff as the reserve value of the policy, with interest from date of payment.

T. S. SEASE,
Judge of Seventh Judicial Circuit.

July 29, 1946.

State of South Carolina,
County of Spartanburg.

I, E. W. Miller, Clerk of the Court of Common Pleas and General Sessions, in and for the County and State aforesaid, do hereby certify that the foregoing is a full and correct copy of the original of a Decree in the case wherein Mary Bell King is plaintiff and Commonwealth Life Insurance Company of Louisville, Kentucky, is defendant, and the same remains of record before the said Court as a part of Judgment Roll No. 33454, Office of the Clerk of Court of Common Pleas, Spartanburg County, South Carolina.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court at Spartanburg Court House, South Carolina, this 4th day of November, 1947.

E. W. MILLER,
Clerk of Court of Common Pleas and General Sessions.

(Official Seal)

State of South Carolina,
County of Spartanburg.

I, E. W. Miller, Clerk of the Court of Common Pleas and General Sessions, in and for the County and State aforesaid, do hereby certify that the Honorable T. S. Sease is and was on July 29, 1946, the duly elected and qualified Circuit Judge of the Seventh Judicial Circuit, for the State of South Carolina, residing in the City of Spartanburg, and that the signature to the attached certificate is genuine.

Given under my hand and seal this 4th day of November, 1947.

E. W. Miller,
Clerk of Court of Common Pleas and General Sessions.

(Official Seal)

State of South Carolina,
County of Spartanburg.

I, T. S. Sease, Presiding Judge of the Seventh Judicial Circuit of the Court of Common Pleas and General Sessions, State of South Carolina, residing in the City of Spartanburg, do hereby certify that E. W. Miller, by whom the above attestation was made, was at the date thereof, Clerk of the said Court, duly elected, commissioned and qualified, and that said attestation is in due form of law, and made by the proper officer, and that Spartanburg County is part of the Seventh Judicial Circuit of South Carolina.

Witness my hand and seal this 4th day of November, 1947.

T. S. Sease, (L.S.)
Judge of the Seventh Judicial Circuit.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1947

No. 171

MARY BELL KING, *Petitioner,*

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI

E. W. DILLON,
Columbus, Ohio
F. DEAN RAINEY,
C. F. HAYNSWORTH, JR.,
Greenville, S. C.
Counsel for Respondent.

BRIEF OF RESPONDENT

I.

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II.

THE OPINIONS OF THE DISTRICT COURT AND COURT OF APPEALS

The opinion of the District Court was filed May 24, 1946, and reported in 65 Fed. Sup. 740.

The opinion of the Circuit Court of Appeals was filed April 9, 1947, and reported in 161 F. 2d 108.

III.

GROUNDS ON WHICH THE PETITIONER SEEKS TO INVOKE THE JURISDICTION OF THE SUPREME COURT

The petition for a writ of certiorari is founded upon an assertion of conflict between the decision of the Circuit Court of Appeals for the Fourth Circuit and the laws of the State of South Carolina.

IV.

ARGUMENT

The petition is founded upon an asserted conflict between the decision of the Circuit Court of Appeals for the Fourth Circuit and the laws of South Carolina, but there is no decision of any court in South Carolina which would constitute a precedent in any court of that State or which is controlling upon any of the courts of the United States, insofar as the question involved in this case is concerned.

The Petitioner here concedes in her brief filed in the United States Circuit Court of Appeals for the Fourth Circuit that, "it is true that the Supreme Court of South Carolina has not decided the question presented by the facts of this case". (Brief of Appellee in Circuit Court of Appeals, p. 11). The Supreme Court of South Carolina is the only court in that State the decisions of which are reported, and only its decisions constitute precedents in that State.

The Petitioner does refer to a decision of a court of original incidence in South Carolina—that of the Court of Common Pleas for the Seventh Judicial Circuit, filed in the office of the Clerk of the Court of Common Pleas for Spartanburg County, South Carolina, and rendered in the case

of *King v. Commonwealth Life Insurance Company of Louisville, Kentucky.*

While the Courts of Common Pleas in South Carolina have very limited appellate jurisdiction, principally as to appeals from Magistrates' Courts (comparable to Justices of the Peace, in other states), they are primarily courts of original incidence. They have original jurisdiction of all civil litigation, though Magistrates' Courts and certain County Courts have limited concurrent jurisdiction. *Rhodes v. Railroad Company,* 6 S. C. 385. In the Courts of Common Pleas civil actions are begun by the service of a summons and complaint and issues of fact in law cases are tried before a jury.

The Courts of Common Pleas in South Carolina are in no sense comparable to the Court of Appeals in Ohio or to the other intermediate appellate courts existing in a number of the more populous states. They are trial courts. Their decisions, orders, and decrees are not published. Short of an examination of every judgment roll in the office of every clerk of those courts in every county in the State of South Carolina, there is no means of determining what, if any, other decisions may have been rendered in the Courts of Common Pleas of South Carolina pertinent to the merits of this case.

A decision of a Court of Common Pleas in South Carolina is not a precedent in that or any other court in South Carolina. Indeed the Petitioner here, in her brief in the Circuit Court of Appeals for the Fourth Circuit, conceded with reference to the case of *King v. Commonwealth Life Insurance Company of Louisville, Kentucky,* "We do not argue that the decision of Judge Sease is binding on this Court • • • •". (Brief of Appellee in Circuit Court of Appeals, p. 12).

It would be anamolous indeed if the courts of the United States were bound to follow a decision of a state court which did not constitute a precedent in any court of the state in which it was rendered.

For the foregoing reasons it is respectfully submitted that the petition should be denied.

Respectfully submitted,

E. W. Dillon,
Columbus, Ohio
F. Dean Rainey,
C. F. Haynsworth, Jr.,
Greenville, S. C.
Counsel for Respondent.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 171

MARY BELL KING, *Petitioner*,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

BRIEF OF RESPONDENT

E. W. DILLON,
Columbus, Ohio
C. F. HAYNSWORTH, JR.,
F. DEAN RAINEY,
Greenville, S. C.
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 171

MARY BELL KING, *Petitioner,*

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

BRIEF OF RESPONDENT

REPORT OF THE OPINIONS IN THE DISTRICT AND CIRCUIT COURTS.

The opinion of the District Court, dated May 24, 1946, is reported in 65 Federal Supplement, page 740.

The opinion of the Circuit Court of Appeals, dated April 9, 1947, is reported in 161 Federal Second, page 108.

GROUNDS OF JURISDICTION.

Jurisdiction rests upon Section 240-A of the Judicial Code, as amended by Act of Congress of February 13, 1925, 43 Stat. 936, (28 USCA, Sec. 347a), conferring jurisdiction to review any judgment of the Circuit Court of Appeals, and Section 5-b of Rule 38, of the Supreme Court, together with diversity of citizenship and the jurisdictional amount.

ARGUMENT

I

There is nothing in the decisions of the Supreme Court of South Carolina in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in this case. The question presented to the Circuit Court of Appeals has not been presented to the Supreme Court of South Carolina nor has that court in any way intimated that it might reach a conclusion at variance with that of the Circuit Court of Appeals.

The dictum in the concurring opinion of Judge Blease in *Bolt v. Life & Casualty Insurance Company of Tennessee*, 156 S. C. 117, 119-120; 152 S. E. 766, 767 (1930), upon which the petitioner relies, is not supported in the recent decisions of that court. Since the decision in the *Bolt* case in 1930 the personnel of the Supreme Court of South Carolina has completely changed, and the recent pronouncements of that court are not in keeping with the inference the petitioner seeks to draw from the dictum of Judge Blease.

In the more recent case of *Haselden v. Standard Mutual Life Ass'n.*, 190 S. C. 1, 5; 1 S. E. (2d) 924, 926 (1939), the Supreme Court of South Carolina said:

> "* * * * Stated more fully, the rule is, that where by reason of ambiguity in the language employed in a contract of insurance, there is doubt or uncertainty as to its meaning, and it is fairly susceptible of two interpretations, one favorable to the insured and the other favorable to the company, the former will be adopted.
>
> "We held in *Prosser, et al. v. Carolina Mut. Ben. Corp.*, 179 S. C. 138, 183 S. E. 710; that where the language of an insurance contract may be understood in more senses than one, or where it is doubtful whether given words were used in an enlarged or restricted sense, other things being equal, that construction should be adopted which is most beneficial to the insured."

In all of its recent references to this principle of contract interpretation, the Supreme Court of South Carolina has used qualifying words consistent with the language quoted above from the *Haselden* case and quite inconsistent with the dictum of Judge Blease in the *Bolt* case.

Before the principle of strict construction against an insurer has any application in the courts of South Carolina, "the policy must be susceptible to two equally reasonable interpretations", *Walker v. Commercial Casualty Ins. Co.*, 191 S. C. 187, 194, 4 S. E. (2d) 248, 250-251 (1939). To the same effect, see also *Kittles v. General American Life Ins. Co.*, 182 S. C. 162, 174-175; 188 S. E. 784, 789 (1936). Before the case is to be determined by an application of the rule of strict construction against an insurer, there must remain after application of all other aids to interpretation a real ambiguity, a "fair and reasonable doubt as to the meaning of the provisions ****", *Smith v. Sovereign Camp W. O. W.*, 204 S. C. 193, 198; 28 S. E. (2d) 808, 810 (1944).

The Supreme Court of South Carolina has clearly stated in *S. S. Newell & Co. v. American Mut. Liability Ins. Co.*, 199 S. C. 325, 332, 19 S. E. (2d) 463, 466 (1942):

> "The rule of strict construction against the insurer does not apply where the language used in the policy is so plain and unambiguous as to leave no room for construction. *** Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists.
>
> "The judicial function of a Court of law is to enforce an insurance contract as made by the parties, and not to re-write or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous. It is not the province of the Courts to construe contracts broader than the parties have elected to make them, or to award benefits where none was intended.***"

The same principle is set forth in the decisions in the cases of *Brown v. Mutual Life Ins. Co. of N. Y.*, 186 S. C. 245, 252-253, 195 S. E. 552, 555 (1938); *Kittles v. General American Life Ins. Co.*, 182 S. C. 162, 174; 188 S. E. 784, 789 (1936); and *Bolen v. Capital Life and Health Ins. Co.*, 208 S. C. 345, 348, 38 S. E. (2d) 79, 80 (1946). In the last two cases the language used is an acknowledged quotation from the language of this court in *Bergholm v. Peoria Life Insurance Company of Peoria, Illinois*, 284 U. S. 489, 492; 52 S. Ct. 230, 231; 76 L. Ed. 416 (1932).

It is apparent that in construing insurance contracts, the Supreme Court of South Carolina applies those principles of contract construction universally recognized by courts of this country. It does so in language which might be used and approved by the courts of any other state. Its language and its holdings are entirely consistent with the conclusion and the language of the Circuit Court of Appeals for the Fourth Circuit in the present case.

The Circuit Court of Appeals for the Fourth Circuit found nothing equivocal in the language of the policy. The words excluding liability "for death resulting from participation **** in aviation" are plain and direct. There is nothing hidden, secretive, equivocal or dubious in them. From them the intent of the parties to exclude liability for a death which results, in the ordinary signification of the word "results", from participation in aviation is clear. That intention being clear, it was the duty of the court, in the language of the South Carolina Supreme Court in the case of *S. S. Newell & Co. v. American Mut. Liability Ins. Co.*, 199 S. C. 325, 332; 19 S. E. (2d) 463, 466 (1942), to liberally construe the policy in order to carry out the evident intention of the parties and not to exercise inventive powers for the purpose of creating doubt or ambiguity.

The insured's death after being forced down at sea in midwinter in a land based plane, even though the insured survived the peril of contact with the water only to die

later of drowning, seems clearly to have resulted from the flight within the evident intent of those words in the policy. In so holding the Circuit Court of Appeals was dealing less with principles of contract interpretation than with principles of proximate causation.

The matter is one of proximate causation, not one of "accidental means", and cases dealing with the question of what constitutes accidental means within the terms of an accident insurance policy have no application to this case where all agree the insured's death was occasioned by accidental means.

The Supreme Court of South Carolina has said (*Horne v. Atlantic Coast Line*, 177 S. C. 461, 469-470; 181 S. E. 642, 646 (1935)):

> "The proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred * * *.
>
> Any cause intervening between the first * * * cause and the final injury, which might reasonably have been foreseen or anticipated * * * is not such efficient intervening cause as will relieve the original * * * of its character in law as the proximate cause of the final injury."

While the Supreme Court of South Carolina has not decided the question presented in this case, a review of its decisions and the language it employs, particularly in the more recent cases, justifies a reasonable expectation that, had the question been presented to it, it would have reached the same conclusion as the Circuit Court of Appeals for the Fourth Circuit. Certainly there is nothing to indicate the contrary.

II

The decision of the Court of Common Pleas for Spartanburg County, South Carolina, in a similar case should

have no greater effect than the Circuit Court of Appeals for the Fourth Circuit accorded it. (T. 25). The Circuit Court of Appeals, informed of the standing of such decisions in South Carolina, properly observed that the decision is not binding on other South Carolina Courts, was rendered in reliance on the District Court opinion in the present case and the petitioner did not contend that it was binding on the Circuit Court of Appeals.

Since the decision of the Circuit Court of Appeals, the identical question was passed upon by the Court of Common Pleas for Greenville County, South Carolina, the order of that court being reproduced in full in the appendix hereto at pages 17-24. The Court of Common Pleas for Greenville County, South Carolina, reached a conclusion in complete harmony with that of the Circuit Court of Appeals in the present case. It pointed out that the decisions of Courts of Common Pleas in South Carolina do not constitute precedents in other cases in the Courts of Common Pleas and it refused to follow the decision of the Spartanburg Court.

The Courts of Common Pleas in South Carolina are trial courts. They are not intermediate appellate courts such as exist in some of the more populous states. While certain other courts have concurrent, though limited, jurisdiction of civil matters, the Courts of Common Pleas have unlimited jurisdiction, as the courts of original incidence, in all such matters. Magistrate's Courts, for instance, have concurrent jurisdiction to hear law cases where the amount claimed is less than $100.00 (1942 Code of Laws of South Carolina, Sec. 257), but the claimant may, at his option, bring his suit initially in the Court of Common Pleas (Art. 5 South Carolina Constitution of 1895, Sec. 15, and see *Rhodes v. Railroad Co.*, 6 S. C. 385).

While the Courts of Common Pleas have a very limited appellate jurisdiction, principally as to appeals from Magistrate's Courts, the great burden of their work is the original trial of proceedings originally commenced within

their jurisdiction. Civil actions are begun in the Courts of Common Pleas by the service of a summons and complaint and all issues of fact in law cases are tried before a jury, unless the parties otherwise agree.

While the State is divided into fourteen judicial circuits (1942 Code of Laws of South Carolina, Vol. 1, Sec. 50), each of which has a Circuit Judge (South Carolina Constitution of 1895 Art. 5, Sec. 13), there is a clerk for the Court of Common Pleas in each of the State's forty-six counties (South Carolina Constitution of 1895, Art. 5, Sec. 27). In general, actions in the Court of Common Pleas are required to be tried in the county where the subject thereof is situated, where the cause arose or where the defendant resides, subject to a change of venue under certain circumstances (1942 Code of Laws of South Carolina, Title 6).

The decisions of the Courts of Common Pleas are not published in printed form. As set forth in the certificate of The Honorable D. Gordon Baker, Chief Justice of the Supreme Court of South Carolina (reproduced in the appendix of this brief at page 16) the orders and decisions of the Courts of Common Pleas are filed in the office of the clerk of that Court in the county in which the case is tried. Such decisions are indexed only under the names of the parties to the action, and no index, file or digest of any type is made or maintained as to subject matter. No interested person could be informed as to all of the decisions of the Courts of Common Pleas on any question except upon a detailed examination of each separate judgment roll in the office of the Clerk of the Court of Common Pleas for each of the State's forty-six counties.

The decisions of the Courts of Common Pleas in South Carolina are, therefore, practically and effectively unavailable to the judiciary and to the bar for use as precedents. In the federal courts, those decisions are, effectively, and as a practical matter, unavailable as data from which to draw any conclusion as to what the state law may be.

This court has held in *Fidelity Union Trust Co. v. Field*, 311 U. S. 169, 61 S. Ct. 176; 85 L. Ed. 109; *Six Companies of California v. Joint Highway District No. 13*, 311 U. S. 180, 61 S. Ct. 186; 85 L. Ed. 114; and *West v. American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, and similar cases, that the federal courts, in the absence of a decision by the court of last resort of a state, should look to other available data from which the state law might be established. The data under consideration in those cases, such as the decisions of intermediate state appellate courts, was readily available to counsel and to the court. They were decisions of courts whose decisions are regularly published in printed form and readily available in the offices of attorneys practicing in those states and in the libraries of courts sitting therein.

There is no such availability of the decisions of the Courts of Common Pleas of South Carolina. It is only by reason of the fortuitous circumstance that the petitioner and her counsel had a similar case in the Court of Common Pleas for Spartanburg County that this Court and the Circuit Court of Appeals were informed of that decision. It is only by reason of the fortuitous circumstance that one of the counsel for the respondent participated in an action involving the same substantive question in the Court of Common Pleas for Greenville County, that this Court is informed of that decision. There may be in the forty-four other counties of South Carolina numerous decisions on file on the same substantive question, but neither this court, nor the Circuit Court of Appeals nor counsel can be informed of them.

Though by fortuitous circumstances, a decision of a Court of Common Pleas may become available to a federal court for its consideration, that at chance occurrence does not mean that the decisions of the Courts of Common Pleas in general are available as data in determining the state law. When a federal court well knows that on a given subject,

there may be many decisions of the Courts of Common Pleas reaching varying conclusions, the fortuitous presentation of one of those decisions should not control the result of the action in the courts of the United States.

When there is the probability that there are many decisions by courts of equal rank, resort to one as establishing the law of all would mean that the result of litigation in the federal courts is to be determined by chance. He who is lucky enough to be informed of a decision of a Court of Common Pleas in his favor would prevail, though he and the court well knew a probability that the Courts of Common Pleas had decided many such cases, perhaps with contrary conclusions. Weird and extraordinary results would necessarily follow.

The blind man who, wishing to know what an elephant was like, seized upon the tail and concluded the elephant was like a snake was no more inaccurate than the Federal Courts would be if, without opportunity of investigating other decisions, they should be required to accept any given decision of the Courts of Common Pleas of South Carolina as establishing the law of that state. The law of the State of South Carolina cannot be accurately shown by considering the tail alone, blind to everything else.

The question now before this Court, in effect, was considered by the Circuit Court of Appeals for the Seventh Circuit in the case of *Brainard v. Commissioner*, 91 Fed. (2d) 880, 883. In that case the court said,

> "Appellant - - - has presented to us a duly authenticated decree of the Circuit Court of Cook County, Illinois, in a case wherein this appellant filed his complaint in chancery, against his wife and mother, for the construction of this trust with respect to the question now before us. That Court differs with us as to the construction and effect of appellant's declaration of trust, and his subsequent acts with respect thereto. With due deference to that Court, however, we cannot accept the

> ruling as an expression of the judgment of the State of Illinois as to the property rights of her citizens in the interpretation of local laws. That Court's jurisdiction is limited to Cook County and there are close to a hundred other Circuit Courts in Ilinois of equal jurisdiction which are not bound by the rulings of the Cook County Circuit Court. In the interpretation of the laws of Illinois, we must look to the decisions of the Supreme Court and Appellate Courts of that state, for their rulings are binding upon all inferior courts of Illinois.'"

A decision of a Court of Common Pleas in South Carolina does not constitute a precedent in that or any other court in that state. It is binding upon the parties to that particular suit unless and until it is reversed on appeal, but a decision of any magistrate or justice of the peace has the same effect. The decisions of the Courts of Common Pleas have no greater effect.

The Honorable D. Gordon Baker, Chief Justice of the Supreme Court of South Carolina, in his certificate (appendix p. 16) states, "* * * under the practice in this State an unappealed decision of the Court of Common Pleas * * * would not constitute a precedent in any other case in that Court or in any other court in the State of South Carolina".

The Honorable Wm. H. Grimball, Circuit Judge, presiding at the fall term of the Court of Common Pleas for Greenville County, South Carolina, in the case of *Gilman F. Thompson, Sr. v. New York Life Insurance Co.* (appendix p. 17) dealt with the same matter. He was considering the same question presented to the Circuit Court of Appeals in the instant case and, referring to the decision of the Court of Common Pleas for Spartaburg County upon which the petitioner in this case now relies, Judge Grimball said:

> "Counsel for the plaintiff has referred to a decision of Judge Sease in the Court of Common Pleas for Spartanburg County in the case of *King*

v. Commonwealth Life Insurance Company of Louisville, Ky. In that case Judge Sease relied upon and followed the decision of Judge Wyche, subsequently reversed, in the Federal District Court in the case of *King v. United Commercial Travelers.* But for the fortuitous circumstance that Judge Sease's decision was rendered in the interim between the District Court decision in the United Commercial Travelers case and the reversal of the District Court by the Circuit Court of Appeals, Judge Sease would probably have reached a different conclusion.

"Other Circuit Judges in this State may have reached conclusions different from Judge Sease's in similar cases, but whatever their conclusions and whatever the basis of Judge Sease's reasoning, this Court looks only to the Supreme Court of South Carolina for guidance and direction. The decisions of other courts are persuasive only to the extent their reasoning is persuasive to the mind of this Court. This Court finds the reasoning of the Circuit Court of Appeals in the recent King case persuasive and sound."

The decision in the Thompson case, contrary to the decision upon which the Petitioner relies as establishing the law of South Carolina, is an emphatic showing that the decision of the Court of Common Pleas of Spartanburg County did not establish the law of the State. A court of equal rank has held that it was not a precedent and has decided the substantive question with an entirely opposite result.

A decision of a Court of Common Pleas of South Carolina should have no greater effect in the Federal Courts than it has in comparable state courts. It is not a precedent in the court in which it was rendered; it should not have greater, certainly not controlling, effect in the federal courts.

The now established proposition that the same rule of law should govern the result in diversity cases whether the case is tried in the state or federal court, requires that the

federal court give the same, but no greater, effect to decisions of state trial courts which the state trial courts themselves would give it. If the federal courts are required to give such decisions greater, even controlling, effect disparity, rather than conformity is the result. If the federal courts are required to treat as establishing the law of the state a decision of a Court of Common Pleas which as a result of fortuitous circumstances may be presented to it, even though it knows there may be several decisions reaching diametrically opposite conclusions, it will be required to be bound by a fragmentary bit of evidence from data which as a whole is entirely unavailable to the court. If the federal court is bound by a decision of a Court of Common Pleas, it will be required in seeking the elephant to grasp the tail and call it a snake.

The Circuit Court of Appeals for the Fourth Circuit is entirely familiar with the courts of South Carolina and the practical situation in that state. The decision of the Circuit Court of Appeals in the present case was rendered against a background of that knowledge. The decision of the Circuit Court of Appeals is in conformity with the practical necessities of orderly trials and the promotion of justice. It is supported in substance and in its appraisal of the decision of the Court of Common Pleas for Spartanburg County by the later decision of the Court of Common Pleas for Greenville County. It promotes and furthers the rule of conformity first enunciated in the decision of this court in the case of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188

III.

This case has been presented as if the result is to be governed by the laws of the State of South Carolina. However, it appears that under the recent decision of this court in the case of *United Commercial Travelers of America v. Wolfe*, — U. S. —; 67 S. Ct. 1355; 91 L. Ed. 1245 the laws of Ohio rather than those of South Carolina are

controlling. Since there are no appellate court decisions in either state on the question presented by the case, a determination of whether the laws of Ohio or those of South Carolina are controlling has not appeared heretofore of any materiality.

Paragraph No. 3 of the Findings of Fact of the District Court (Tr. 1) is as follows:

> "3. The defendant is a Fraternal Benefit Association organized and maintained for the purpose, among other things, to 'establish funds to indemnify its members for disability or death resulting from accidental means'; incorporated under the laws of the State of Ohio, and licensed to do business as a fraternal benefit association in the State of South Carolina."

In the District Court opinion it is set forth that the parties stipulated to the same effect (Tr. 5). Both the District Court and the Circuit Court of Appeals held that the contract of insurance was a South Carolina contract "and it must be governed, solved and construed by the laws of this State" (Tr. 4 and 21).

The opinion of the Circuit Court of Appeals was handed down on April 9, 1947. Thereafter, on June 9, 1947, the Supreme Court of the United States decided the case of *The Order of United Commercial Travelers of America v. Edward C. Wolfe*, —U. S.—; 67 S. Ct. 1355, 91 L. Ed. 1245, a case involving this identical defendant and the identical contract which is now before this court. That decision clearly and unequivocally lays down the rule that the law of the domicile and not the law of the forum must be looked to in construing the contract of insurance issued by a fraternal beneficiary society. In its concluding paragraph the Supreme Court said:

> "this Court consistently has upheld, on the basis of evaluated public policy, the law of the state of incorporation of a fraternal benefit society as the law that should control the validity of the terms of membership in that corporation."

It will thus be seen that even if a court of last resort in South Carolina had passed upon the identical question here involved, the full faith and credit clause of the United States Constitution would require that the construction and validity of this clause be determined according to the law of Ohio rather than the law and decisions in South Carolina; indeed, this court in the *Wolfe* case did not base its decision upon the question as to the place of contract, saying:

> "We rely upon the character of the membership obligation sued upon. There is substantial evidence to support a contention that the contract of membership, including all insurance rights, was made in Ohio and that many acts in connection with the contract were required to be performed in Ohio and were so performed. *However, we do not rely upon the place of concluding the contract of membership or upon the place prescribed for its performance.* We rely, rather, upon its character as something created, regulated and subject to change through a fraternal and representative form of intra-corporate government, dependent for its terms, continuity and unity upon public acts of Ohio creating and regulating fraternal societies." (Emphasis ours.)

The case of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817; 82 L. Ed. 1188, is therefore not applicable for the court in the *Erie* case said:

> "Third. Except in matters *governed by the Federal Constitution* or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." (Emphasis ours.)

The Courts of Ohio have not had occasion to pass upon an aviation clause similar to the one at bar, but the latest expression of the Supreme Court of Ohio on the question of construction of insurance contracts, which case inci-

dentally involved an aviation clause, is that of *McBride v. Prudential Insurance Co.*, 72 N. E. (2) 98. The syllabi are as follows:

> "1. Policies of insurance prepared by an insurance company and reasonably open to different interpretations will be construed most favorably to the insured.
>
> "2. An insurance policy is a contract and in the construction thereof, the words therein should be given their usual and ordinarily accepted meaning.
>
> "4. In a life policy limiting liability to return of premiums in case of death as the result of riding in aircraft except as a passenger on a 'regularly scheduled passenger flight' of a commercial aircraft, the quoted words mean trips regularly scheduled as to time of departure and arrival by commercial airlines operating between definitely established airports."

A succinct statement of the rule which must be applied where there is no statutory law or decisions is set forth in 24 Cor. L. Q. 54, as follows:

> "If the courts of the state *whose law is applicable* have never passed upon the problem, what is the law which the Federal Court must apply? The Federal Court must do what it thinks a court of the state whose law is applicable would do * * *." (Emphasis ours.)

Respectfully submitted,

E. W. Dillon
Columbus, Ohio
C. F. Haynsworth, Jr.
F. Dean Rainey
Greenville, S. C.
Counsel for Respondent

APPENDIX

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

I, D. Gordon Baker, Chief Justice of the Supreme Court of the State of South Carolina, do hereby certify:

1. That under the practice in this State an unappealed decision of the Court of Common Pleas is binding only upon the parties who are before the Court in that particular case and would not constitute a precedent in any other case in that Court or in any other court in the State of South Carolina.

2. That the decisions of the Court of Common Pleas are not, and have never been, published in printed form in this State; that such decisions are filed in the office of the Clerk of said Court for the County in which the case is tried and are indexed only under the names of the parties thereto; that no index, file or digest is made or maintained as to subject matter and there exists no means by which the decisions of such Court upon any subject could be determined, other than by a detailed examination of each judgment roll on file in the offices of the Clerks of Court for each of the State's forty-six Counties.

At Florence, S. C., this 14th day of November, 1947.

D. Gordon Baker
Chief Justice of The
Supreme Court of the State
of South Carolina

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

I, J. B. Westbrook, Clerk of the Supreme Court of the State of South Carolina, do hereby certify that Honorable D. Gordon Baker is the duly elected and qualified Chief

Justice of the Supreme Court of the State of South Carolina and that the signature to the attached certificate is genuine.

Given under my hand and the seal of said court this 18th day of November, 1947.

(Official Seal)

J. B. Westbrook
Clerk of the Supreme Court of the State of South Carolina

IN THE COURT OF COMMON PLEAS
GREENVILLE COUNTY, SOUTH CAROLINA

Gilman F. Thompson, Sr.

vs.

New York Life Insurance Co.

ORDER

By his complaint, the plaintiff alleged the issuance of a policy of life insurance by the defendant to Gilman F. Thompson, Jr., son of the plaintiff in the face amount of $1,000 with double indemnity provisions in case the death of the insured resulted from accidental means. The complaint alleges, on information and belief, that the insured died on or about October 12, 1945 and that the death resulted from accidental means.

By its answer, the defendant admitted the allegation that the insured died on or about October 12, 1945, but alleged that the insured, an officer in the Army Air Corps, died as a result of the crash of a plane, of which the insured was the navigator, in the vicinity of the Bonin Islands and set up certain provisions of the policy fixing the defendant's liability in the event the death of the insured should result from an act of war or an act incident to war or from operating or riding in any kind of aircraft except as a fare-paying passenger of a commercial airline and flying on a regularly scheduled route between definitely established airports.

At the trial of the case, the defendant offered evidence of the circumstances of the insured's death including certified copies of records of the Casualty Section of the Adjutant General's Office of the War Department. These records, abundantly identified by a deposition of an official having official custody of the records and whose duties include the maintenance and handling of such records, are required to be kept by the regulations of the War Department. In that Section the records with respect to all casualties are kept and maintained. In them is assembled and recorded in official form all pertinent information regarding the circumstances of each casualty, and copies of communications addressed to the next of kin are there on file.

The Court admitted the deposition and supporting copies of the official records of the Casualty Section of the Adjutant General's Office. Under the circumstances, such evidence appears to be the best and most reliable evidence of the fact of death and the surrounding circumstances. If such records are not admissable, the next of kin and the beneficiaries of insurance policies, in a large proportion of the cases, could not prove the fact of death of war and battle casualties. It is common knowledge that in a large proportion of the cases eye witnesses could not be located by the families of the decedent and brought before the Court. Under the circumstances the official army records seem the best and the proper method of proving the death and the surrounding circumstances.

The evidence showed that the insured at the time of his death was a 2nd Lieutenant in the Army Air Corps attached to the Troop Carrier Command in the Far Pacific Area. From such evidence, it appears that on October 12, 1945, the insured, on a troop ferrying mission, left Naha Airfield on Okinawa in the Ryukyu Islands as a member of the crew of a C-46 type military plane bound for Iwo Jima in the Volcano Islands. The plane reported by radio

from the vicinity of the Bonin Islands, but was never thereafter heard from. Extensive search was conducted of the area in which the plane might have gone down, both of the sea area and of islands in the area, but no trace could be found of the plane, its crew or its passengers.

In due course, the War Department reported to the plaintiff that the insured was missing. Subsequently it was reported to the plaintiff that his son had been killed on the day he previously had been reported as missing, no trace having been found in the interval of the plane or of the insured and the other occupants of the plane.

The defendant at the close of the evidence made a motion for a directed verdict for the plaintiff for the sum of $101.49, representing a return of premiums, dividends, etc., and interest on such items upon grounds that the war and aviation provisions of the policy severally limited the liability of the defendant to such amount.

The Plaintiff made a motion for a directed verdict for the plaintiff for $1,000.00 with interest from October 12, 1945 upon grounds that the proof did not establish that the insured died as a result of an act of war or of an act incident thereto, or as a result of an airplane flight.

In connection with the motions the plaintiff tacitly abandoned his claim to double indemnity, conceding that a provision for automatic termination of the double idemnity provision upon the insured's entry into the military service of this country while engaged in war was applicable and barred recovery under the double indemnity provisions. The double indemnity provisions also contained war and aviation limitations similar to those hereinafter adverted to, and it is clear that if, upon the showing made, the plaintiff is not entitled to recover the face amount of the policy, he is not entitled to anything under the double indemnity provisions.

The policy contained a provision, the pertinent part of which provides:

> "If the death of the Insured shall result from
>
> "(1) an act of war or any act incident to war, provided such act occurs while the Insured is in the military or naval service of any country engaged in war and that such death occurs while the Insured is in such service or within six months thereafter; or
>
> "(2) operating or riding in any kind of aircraft, whether as a passenger or otherwise, other than as a fare-paying passenger of a commercial airline and flying on a regularly scheduled route between definitely established airports; or
>
> "(3) an act of war or any act incident to war, provided such act occurs while the Insured is outside the forty-eight states of the United States of America, the District of Columbia, and the Dominion of Canada and that such death occurs within two years from the date of issue of this Policy,
>
> the amount payable under this Policy shall be a sum equal to the premiums paid to and received by the Company under this Policy for the face amount of this Policy (or the reserve on the face amount of this Policy at the date of death of the Insured, if greater), plus the reserve on any outstanding dividend additions, and any outstanding dividends, including dividend deposits, and less any indebtedness hereon."

The Court has the deepest sympathy for the plaintiff. I, too, had sons in the war, two of them, and while both of them returned safely to this Country and to their homes, I know the sense of loss the plaintiff feels.

But the Court must determine the legal relation of the parties, not on the basis of sympathy for the plaintiff, but upon established legal principles. The evidence submitted

admits of no other reasonable conclusion than that the death of the insured resulted from an act of war or an act incident thereto and that it also resulted from operating or riding in an aircraft other than as a fare-paying passenger, and the Court must so hold.

The provisions of the policy with respect to war and aviation risks are reasonable. Those risks are widely regarded as extra-hazardous and it is entirely proper for the insurance company and the insured to agree, as they did here, that the insurance will not cover such risks. It is widely understood that the premiums to be paid are computed with reference to such provisions and it is standard practice to require additional premiums for the assumption of such risks. Unquestionably those provisions of the policy are binding upon the plaintiff, and if the death of the insured resulted either from an act of war or an act incident thereto or from operating or riding in any kind of aircraft other than as a fare-paying passenger, etc., the plaintiff can not recover more than the sum of $101.49 which the defendant admits is due.

The Court can see no other reasonable conclusion than that the insured's death did result from an act of war or an act incident thereto within the meaning of the language of the policy. The insured was an officer in the army, proceeding on a military mission as a member of the crew of a military plane.

While it is true that the Japanese had formally surrendered a few weeks earlier, that surrender did not terminate the war. The State of War between the two nations, as declared by the Congress, continued. See *West v. Palmetto State Life Ins. Co.*, 202 S. C. 422, 25 S. E. (2d) 475.

There was here causal connection between the war and the death of the insured. The insured was one of those millions of young men who went into the army in time of war. But for the war the insured would not have been present in that area, and probably would never have been

in the army. Certainly but for the war, he would not have been flying in that military plane on that military mission.

The movement of the thousands of troops homeward from what so recently had been the scene of terrific fighting was only in its early stages when the insured met his death while performing a mission in furtherance of that movement. The movement homeward of those thousands who had fought so bravely was just as causally related to the war as the earlier movement of those troops outward to battle areas had been. Each was occasioned solely by the war; each was an act incident to the war. The causal connection which was lacking in *Smith v. Sovereign Camp W. O. W.*, 204 S. C. 193, 28 S. E. (2d) 808, is present here and I can not but conclude that the insured died as a result of an act incident to war.

The evidence also admits of no other reasonable conclusion than that the insured died as a result of the plane flight. The flight is the very substance of the suit. The plaintiff would have no possible claim except for the death of the insured and the conclusion that the insured died is predicated upon the plane flight.

The evidence shows that the conclusion that the insured was killed rests solely upon the fact of the flight, the disappearance of the plane and the fruitless search of sea and land for the plane and its occupants. The army necessarily determined officially that the facts justified the conclusion of death. That conclusion seems reasonable and proper. But when the conclusion that the insured was killed is bottomed solely on the fact of the flight, it seems utterly impossible to allege the insured's death and at the same time to support an inference that the insured's death did not result from the flight.

The plaintiff suggests that the plane might have landed upon the water and the insured escaped uninjured to die later of drowning or other perils of the area in which the plane might have gone down. The defense is an affirmative

one, but if the Court assumes the hypothesis suggested by the plaintiff, the Court must still conclude that the death resulted from the flight within the meaning of the policy.

Many perils are real and obvious when flying over ocean expanses. That the plane may explode in mid-air may be one. That it may come into such violent contact with the ocean surface that its occupants are mortally injured is another. But the risk of drowning upon being precipitated into an unfriendly ocean far from land and succor is certainly another obvious, forseeable, well recognized risk of such flight. Indeed having undertaken the flight, an ensuing casualty must be said to result from it unless, meanwhile, the occupants of the plane have reached a position of safety. It seems to this Court to matter not in what particular fashion the death may eventuate, so long as the flight leads through an unbroken chain of events without an efficient intervening cause to the death. Accepted principles of proximate causation should be applied, and, so applied, the only reasonable inference in this case is that the death resulted from the flight.

While the Supreme Court of South Carolina, whose decisions alone are binding upon this Court, seems never to have considered this question, there is abundant and persuasive authority from other jurisdictions in support of the views above expressed. *King v. United Commercial Travelers of America*, 167 Fed. (2d) 108 (C. C. A. 4th 1947); *Neel v. Mutual Life Insurance Co.*, 131 Fed. (2d) 159 (C. C. A. 2nd 1942); *Green v. Mutual Benefit Life Insurance Co.*, 144 Fed. (2d) 55 (C. C. A. 1st 1944).

The recent case decided by the Fourth Circuit Court of Appeals (*King v. United Commercial Travelers of America, supra*) arose in this State, and I find the reasoning of that decision persuasive.

Counsel for the plaintiff has referred to a decision of Judge Sease in the Court of Common Pleas for Spartanburg County in the case of *King v. Commonwealth Life In-*

surance Company of Louisville, Ky. In that case Judge Sease relied upon and followed the decision of Judge Wyche, subsequently reversed, in the Federal District Court in the case of *King v. United Commercial Travelers.* But for the fortuitous circumstance that Judge Sease's decision was rendered in the interim between the District Court decision in the United Commercial Travelers case and the reversal of the District Court by the Circuit Court of Appeals, Judge Sease would probably have reached a different conclusion.

Other Circuit Judges in this State may have reached conclusions different from Judge Sease's in similar cases, but whatever their conclusions and whatever the basis of Judge Sease's reasoning, this Court looks only to the Supreme Court of South Carolina for guidance and direction. The decisions of other courts are persuasive only to the extent their reasoning is persuasive to the mind of this Court. This Court finds the reasoning of the Circuit Court of Appeals in the recent King case persuasive and sound.

When the assumption of death, reasonable and proper as it is, is predicated upon the fact of the flight, the evidence admits of no other reasonable conclusion than that the death resulted from the flight. This conclusion is unaffected by any hypothesis we might adopt as to the particular circumstances by which the death eventuated. The eventuality might have come about in various ways, but clearly the eventuality resulted from the flight.

Since it appears to this Court that the evidence is susceptible of no other reasonable conclusion than that the insured died as the result of an act of war or of an act incident to war and that he also died as the result of operating or riding in an airplane, not as a fare-paying passenger, I must for both reasons grant the defendant's motion.

I therefore direct a verdict for the plaintiff for One Hundred and One and 49/100 ($101.49) Dollars.

WM. H. GRIMBALL,
Presiding Judge

November 19, 1947.

STATE OF SOUTH CAROLINA,
COUNTY OF GREENVILLE.

I, T. E. Christenberry, Clerk of the Court of Common Pleas and General Sessions, in and for the County and State aforesaid, do hereby certify that the foregoing is a full and correct copy of the original of an order in the case wherein Gilman F. Thompson, Sr. was Plaintiff and New York Life Insurance Company was Defendant; that the original of said order was duly filed in this office on the 20th day of November, 1947 and is now on file therein as a part of the record in the aforementioned case.

I further certify that Honorable W. H. Grimball is the duly elected and qualified Circuit Judge of the Ninth Judicial Circuit for the State of South Carolina and was duly and regularly assigned to the Thirteenth Judicial Circuit, which includes the County of Greenville, for the fall of 1947 and was the Presiding Judge before whom the before mentioned case was tried.

In Testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, at Greenville, South Carolina, this 24th day of November, 1947.

(Official Seal)

T. E. CHRISTENBERRY,
Clerk of Court of Common Pleas and of Court of General Sessions

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 171

MARY BELL KING, *Petitioner,*

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

PETITION FOR REHEARING

JESSE W. BOYD,
HARVEY W. JOHNSON,
Counsel for Petitioner.

JOHNSON, JOHNSON & FOSTER,
Spartanburg, South Carolina,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947

No. 171

MARY BELL KING, *Petitioner,*

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

PETITION FOR REHEARING

Since certiorari was granted in order to determine whether the Circuit Court of Appeals' refusal to follow the only South Carolina decision directly in point, the decision of a Court of Common Pleas, was consistent with the Rules of Decision Act as applied in *Erie R. Co. v. Tompkins,* 304 U. S. 64 (1938) and subsequent cases, the petition will be limited to that question.

We respectfully submit that the Court has fallen into error by being influenced by extraneous judicial events that have occurred entirely since the Court allowed a writ of certiorari on October 13, 1947.

The District Court decided the issue on May 24, 1946, applying a South Carolina statute and seven decisions of the Supreme Court of South Carolina as declaring the law applicable to the case. Two months later, the Court of Common Pleas for Spartanburg County likewise ruled in favor of Mrs. King in a suit against a different insurer on

a $2,500 policy which contained an almost identical aviation exclusion clause. The Judge followed the same reasoning as the District Court had and relied, at least in part, on that Court's decision. Under South Carolina statutes, the insurer in this second case had the right to appeal to the State Supreme Court, but did not do so.

The Court may assume in that case that the insurance company was represented by the ablest counsel obtainable, as an insurance company always is. And yet the Court may assume that able counsel concluded that the decision correctly decided the case, or surely they would have availed themselves of such right. The amount involved was exactly one-half the amount involved in this case, and the cost of appeal far less. At any rate, the petitioner's counsel (by whom the opinion was written as is generally done by prevailing counsel in Common Pleas Court) filed the opinion with the Circuit Court of Appeals, as the law of that case, and entitled to high persuasive consideration in this one.

However, the Circuit Court of Appeals in dealing with this decision simply said that it was not binding on other South Carolina Courts, was not binding on it and that they could not treat it as a final expression of South Carolina law. It was final as far as that case was concerned and the best law available on the facts involved. Unless these unappealed decisions are to be followed in Federal Courts, then there is no precedent of law established against a foreign insurance company that elects to go into the Federal Court which it has a right to do, but only on diversity of citizenship. Once in the Federal Court, they are not bound by unappealed unfavorable decisions, and the slate is clean to find other law, from other states, and varying factual conditions, unless a miracle happened to produce the identical facts.

That is really the exact difficulty that makes the second Common Pleas decision inapplicable. The facts are not the same, or anywhere near the same, as the instant case,

and while the decision may appear to muddy the water as far as the law is concerned, it need not do so. At this point, we should go back and examine the respondent's brief contra petition for writ of certiorari, and while it attempts to minimize the jurisdiction of the Court of Common Pleas and its decisions, it does not at this stage of the litigation have the benefit of the second Common Pleas decision which seems to have finally determined the decision of this case; and we respectfully submit erroneously so, although unanimous.

To show the lack of factual similarity between the two Common Pleas decisions, we simply quote from the second opinion, the Greenville decision.

"The evidence showed that the insured at the time of his death was a 2nd Lieutenant in the Army Air Corps attached to the Troop Carrier Command in the Far Pacific Area. From such evidence, it appears that on October 12, 1945, the insured, on a troop ferrying mission, left Naha Airfield on Okinawa in the Ryukyu Islands as a member of the crew of a C-46 type military plane bound for Iwo Jima in the Volcano Islands. The plane reported by radio from the vicinity of the Bonin Islands, but was never thereafter heard from. Extensive search was conducted of the area in which the plane might have gone down, both of the sea area and of islands in the area, but no trace could be found of the plane, its crew or its passengers."

In that case, there was a war clause which is absent in the instant case, and which the Court construes definitely in favor of the insurance company in the following language:

"The Court can see no other reasonable conclusion than that the insured's death did result from an act of war or an act incident thereto within the meaning of the language of the policy. The insured was an officer in the army, proceeding on a military mission as a member of the crew of a military plane."

In other words, the Court had already decided in favor

of the insurance company under the war clause that death occurred under the war clause and on the admitted facts; namely, the total disappearance of the plane and its crew. However, the construction of the aviation clause is based upon various unknown hypotheses as to how death did occur. And even then the Court says that the clause applied "without an efficient intervening cause." There was no evidence what the cause was then, but in the instant case, there was no crash, no bodily injury, complete disengagement practically uninjured, survival for several hours, and finally death from exposure and drowning.

When this Court granted the writ of certiorari in this case, the petitioner renewed hope, but counsel for the defendant had no answer to the Common Pleas decision directly in point. The decision being on practically the same facts was practically indestructible, so they decided to pull down the whole system of Common Pleas Courts and bury the decision under it. Regardless of the picture of ineffectuality that had been painted, the Common Pleas Courts are the backbone of the judicial system and the Court in which the average lawyer spends most of his life, day after day.

Great stress is laid on the fact that its decisions are not published, but somehow or other their rulings get around as fast or faster than advance sheets of published reports are received in the lawyers' office. They are reported in the press, discussed by the judiciary among themselves as it travels on circuit, and likewise by members of the bar, not to mention the publicity given by the general public. It is a pretty safe statement that if a lawyer loses a case in the Piedmont, he is very likely to be confronted with the adverse ruling a hundred or two hundred miles away in a similar case very quickly. In other words, the news travels, and it doesn't have to go to a publishing house and come back digested, with syllabi and a key number to give it currency.

The confusion pictured by respondents' counsel does

not exist. If it did, though, we think it would be better for lawyers to be confused than litigants. As matters now stand, that is the position of the petitioner.

Petitioner files two suits in the State Court against two defendants on two identical causes of action, one for more than $3,000.00 and one for less than $3,000.00. The suit for the larger amount is transferred to a Federal Court. She receives a favorable decision in both cases upon trial, one by the Circuit Judge and the other by the District Judge in South Carolina.

The State Court and the Federal Court buildings in Spartanburg, South Carolina, face each other on opposite sides of Magnolia Street. It is certainly confusing to the litigant to prevail in the action in the State Court and to be defeated in practically the same action across the street in the Federal Court less than one hundred feet away.

For the reasons stated, therefore, we most respectfully petition that the Court allow a rehearing in this cause.

Respectfully submitted,

JESSE W. BOYD,
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I hereby certify that the within Petition is in my opinion meritorious and not filed for purposes of delay.

HARVEY W. JOHNSON.

SUPREME COURT OF THE UNITED STATES

No. 171.—October Term, 1947.

Mary Bell King, Petitioner, v. The Order of United Commercial Travelers of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[March 8, 1948.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

This is a suit to obtain payment of the proceeds of a $5,000 insurance policy. Federal jurisdiction is founded on diversity of citizenship, and, for present purposes, South Carolina law is controlling.[1] We granted certiorari [2] in order to determine whether the Circuit Court of Appeals' refusal to follow the only South Carolina decision directly in point, the decision of a Court of Common Pleas, was consistent with the Rules of Decision Act [3] as applied in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), and subsequent cases.

The petitioner, Mrs. King, is the beneficiary of the policy; her husband, Lieutenant King, was the insured; and the respondent Order of United Travelers of America is the insurer. The policy insured against King's accidental death, but contained a clause exempting the

[1] Both courts below so held, and until the case was briefed for this Court, neither party took issue with this holding or raised any full faith and credit question. Hence it is unnecessary for us to consider whether or not *United Commercial Travelers of America* v. *Wolfe*, 331 U. S. 586 (1947), is applicable.

[2] 332 U. S. 754.

[3] Judiciary Act of 1789, § 34, R. S. § 721, 28 U. S. C. § 725.

respondent from liability for "death resulting from participation . . . in aviation." It is this aviation exclusion clause which gave rise to the litigation now before us.

King lost his life one day in the winter of 1943 when a land-based Civil Air Patrol plane in which he was flight observer made an emergency landing thirty miles off the coast of North Carolina. The plane sank, but King was not seriously hurt and managed to get out of the plane and don his life jacket. He was still alive two and a half hours later, when an accompanying plane was forced to leave the scene. When picked up about four and a half hours after the landing, however, he was dead. The medical diagnosis was "drowning as a result of exposure in the water."

The respondent took the position that death, while "accidental," resulted from "participation . . . in aviation." Accordingly, it refused to pay Mrs. King the proceeds of the policy. A resident of South Carolina, she then sued the respondent in a court of that State, contending that drowning rather than the airplane flight was the cause of death within the meaning of the policy. The respondent, an Ohio corporation, exercised its statutory right to remove the cause to the federal District Court for the Western District of South Carolina.[4]

The parties agreed that South Carolina law was controlling, but up to the time of the District Court's decision neither of them had located any decision on aviation exclusion clauses by any South Carolina court. The District Court therefore fell back on what it deemed to be general principles of South Carolina insurance law, as enunciated by the State supreme court: that ambiguities in an insurance contract are to be resolved in favor of the beneficiary, and that the cause of death, within the meaning of accident insurance policies, is the immediate, not the

[4] 28 U. S. C. § 71.

remote cause.[5] Applying these principles, the court held that King's death resulted from drowning, not from participation in aviation, and that Mrs. King was entitled to recover.[6]

Two months later, a South Carolina court, the Court of Common Pleas for Spartanburg County, likewise ruled in favor of Mrs. King in a suit against a different insurer on a $2,500 policy which contained an almost identical aviation exclusion clause. The judge followed the same reasoning as the District Court had and relied, at least in part, on that court's decision. Under South Carolina statutes the insurer in this second case had the right to appeal to the State supreme court,[7] but did not do so.

On appeal of the present case, the Circuit Court of Appeals reversed the District Court's judgment for Mrs. King.[8] The court acknowledged that under South Carolina law ambiguities in insurance policies are to be construed against the insurer, but it found no ambiguity in the aviation exclusion clause insofar as its application to the facts of this case was concerned. On the contrary, King's death was thought clearly to have resulted from

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[5] For this proposition the court cited *Goethe* v. *New York Life Ins. Co.*, 183 S. C. 199, 190 S. E. 451 (1937). In that case the insured died following vigorous efforts to put out a fire. There was disputed medical evidence as to whether the symptoms shown just before death indicated heatstroke or heart disease as the cause of death. There was no evidence that the insured suffered from heart disease before that time. The Supreme Court of South Carolina upheld a jury determination that heatstroke caused death, and then, on the most disputed point in the case, ruled that heatstroke was a "bodily injury" within the meaning of an accident insurance policy. It seems to us, as it apparently did to the Circuit Court of Appeals, questionable whether this case supports the principle for which it was cited.

[6] 65 F. Supp. 740 (1946).

[7] 1 S. C. Code Ann. §§ 26 and 780.

[8] 161 F. 2d 108 (1947).

"participation . . . in aviation." Nothing in South Carolina Supreme Court decisions, it was said, was inconsistent with this view, whereas that court's accepted theories of proximate cause in tort cases supported it.[9] Under these circumstances, the Circuit Court of Appeals expressed its disbelief that the Supreme Court of South Carolina would have ruled for Mrs. King, had her case been before it, "in the face of reason and the very considerable authority" from other jurisdictions.[10] The Common Pleas decision in Mrs. King's favor, it was thought, was not binding on the Circuit Court of Appeals as a final expression of South Carolina law since it was not binding on other South Carolina courts and since the court rendering it had relied on the District Court's ruling in the present case.

After we granted certiorari, a new factor was interjected in the case. Another South Carolina Court of Common Pleas, the one for Greenville County, handed down an opinion which, so far as relevant here, expressly rejected the reasoning of the Spartanburg Court of Common Pleas and espoused that of the Circuit Court of Appeals.

What effect, if any, we should give to this second Common Pleas decision becomes an appropriate subject for inquiry only if it is first determined that the Circuit Court of Appeals erred in not following the Spartanburg decision, which was the only one outstanding at the time of its action.[11] We therefore address ourselves first to that question.

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[9] The court cited *Horne* v. *Atlantic Coast Line R. Co.*, 177 S. C. 461, 181 S. E. 642 (1935).

[10] Among the cases cited were *Neel* v. *Mutual Life Ins. Co. of New York*, 131 F. 2d 159 (C. C. A. 2, 1942), and *Green* v. *Mutual Benefit Life Ins. Co.*, 144 F. 2d 55 (C. C. A. 1, 1944).

[11] Although the decision by the Spartanburg Court of Common Pleas was rendered after the District Court decision, it was proper for the Circuit Court of Appeals to consider it. See *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538 (1941).

The Rules of Decision Act [12] commands federal courts to regard as "rules of decision" the substantive "laws" of the appropriate state, except only where the Constitution, treaties, or statutes of the United States provide otherwise. And the *Erie R. Co.* case decided that "laws," in this context, include not only state statutes, but also the unwritten law of a state as pronounced by its courts.

The ideal aimed at by the Act is, of course, uniformity of decision within each state. So long as it does not impinge on federal interests, a state may shape its own law in any direction it sees fit, and it is inadmissible that cases dependent on that law should be decided differently according to whether they are before federal or state courts. This is particularly true where accidental factors such as diversity of citizenship and the amount in controversy enable one of the parties to choose whether the case is tried in a federal or a state court.

Effectuation of that policy is comparatively easy when the issue confronting a federal court has previously been decided by the highest court in the appropriate state; the *Erie R. Co.* case decided that decisions and opinions of that court are binding on federal courts. The *Erie R. Co.* case left open, however, the more difficult question of the effect to be given to decisions by lower state courts on points never passed on by the highest state court.

Two years later, a series of four cases presented some aspects of that question. In three of the cases this Court held that federal courts are bound by decisions of a state's intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise. *Six Companies* v. *Highway District*, 311 U. S. 180 (1940); *West* v. *American T. & T. Co.*, 311 U. S. 223 (1940); and *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464 (1940).[13] In the fourth case, *Fidelity Union Trust*

[12] See note 3, *supra*.

[13] In all three cases the state supreme court had refused to review the intermediate appellate court decision; in the *West* and *Stoner*

Co. v. *Field*, 311 U. S. 169 (1940), the Court went farther and held that a federal court had to follow two decisions announced four years earlier by the New Jersey Court of Chancery, a court of original jurisdiction.

The *Fidelity Union Trust Co.* case did not, however, lay down any general rule as to the respect to be accorded state trial court decisions. This Court took pains to point out that the status of the New Jersey Court of Chancery was not that of the usual *nisi prius* court. It had state-wide jurisdiction. Its standing on the equity side was comparable to that of New Jersey's intermediate appellate courts on the law side. A uniform ruling by the Court of Chancery over a course of years was seldom set aside by the state's highest court. And chancery decrees were ordinarily treated as binding in later cases in chancery.

The present case involves no attack on the policy of the Rules of Decision Act, the principle of the *Erie R. Co.* case, or the soundness of the other cases referred to above. It involves the practical administration of the Act; and the question it raises is whether, in the long run, it would promote uniformity in the application of South Carolina law if federal courts confronted with questions under that law were obliged to follow the ruling of a Court of Common Pleas.

The Courts of Common Pleas make up South Carolina's basic system of trial courts for civil actions.[14] There are

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cases, the intermediate appellate court's decision had involved the same parties engaged in the subsequent case before the federal courts; and in the *Six Companies* case, the intermediate appellate court's decision had remained on the books for over twenty years without disapproval. These factors were mentioned in our opinions, but were not necessarily determinative. See *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 178 (1940).

[14] S. C. Const. Art. 5, § 15. These courts also have limited appellate jurisdiction, varying somewhat from county to county. The

fourteen judges for these courts, one for each of the judicial circuits into which the state's forty-six counties are grouped.[15] A circuit judge hears civil cases at specified times in each county comprising the circuit to which he is then assigned, and at such times his court is called the Court of Common Pleas for that particular county.[16] In addition, he presides over a parallel set of criminal courts, the Courts of General Sessions. South Carolina has no tier of intermediate appellate courts, and appeal from Common Pleas decisions is directly, and as a matter of right, to the State supreme court.[17]

While the Courts of Common Pleas are denominated courts of record, their decisions are not published or digested in any form whatsoever. They are filed only in the counties in which the cases are tried, and even there the sole index is by the parties' names.[18] Perhaps because these facts preclude ready availability to bench and bar, the Common Pleas decisions seem to be accorded little weight as precedents in South Carolina's own courts. In this connection, respondent has submitted a certificate from the Chief Justice of the Supreme Court of South

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Court of Common Pleas for Spartanburg County handles appeals from the county's probate court, 1 S. C. Code Ann. § 228, its court of domestic relations, 1 *id.* §§ 256–24 and 256–44, and its magistrates courts. The latter have civil jurisdiction concurrent with the courts of Common Pleas only in suits involving less than $100, 1 *id.* § 257.

The county court for Spartanburg County has concurrent jurisdiction in civil suits involving less than $3,000, but appeal from its decisions is directly to the Supreme Court of South Carolina, 1 *id.* §§ 184 and 190.

[15] S. C. Const. Art. 5, § 13; 1 S. C. Code Ann. § 50. There is provision for periodic interchange of judges among the circuits. 1 S. C. Code Ann. § 22.

[16] S. C. Const. Art. 5, § 16; 1 S. C. Code Ann. §§ 51–64.

[17] See note 7 *supra.*

[18] S. C. Circuit Court Rule 39. There is a Clerk of the Court of Common Pleas for each county. S. C. Const. Art. 5, § 27.

Carolina to the effect that "under the practice in this State an unappealed decision of the Court of Common Pleas is binding solely upon the parties who are before the Court in that particular case and would not constitute a precedent in any other case in that Court or in any other court in the State of South Carolina."

Consideration of these facts leads us to the conclusion that the Circuit Court of Appeals did not commit error. While that court properly attributed some weight to the Spartanburg Common Pleas decision, we believe that it was justified in holding the decision not controlling and in proceeding to make its own determination of what the Supreme Court of South Carolina would probably rule in a similar case.

In the first place, a Court of Common Pleas does not appear to have such importance and competence within South Carolina's own judicial system that its decisions should be taken as authoritative expositions of that State's "law." In future cases between different parties, as indicated above, a Common Pleas decision does not exact conformity from either the same court or lesser courts [19] within its territorial jurisdiction; and it may apparently be ignored by other Courts of Common Pleas without the compunctions which courts often experience in reaching results divergent from those reached by another court of coordinate jurisdiction. Thus a Common Pleas decision does not, so far as we have been informed, of itself evidence one of the "rules of decision commonly accepted and acted upon by the bar and inferior courts." [20] Furthermore, as we have but recently had occasion to remark, a federal court adjudicating a matter of state law in a diversity suit is, "in effect, only another court

[19] *I. e.*, county courts, magistrates courts, probate courts, and courts of domestic relations. See note 14 *supra*.

[20] *West* v. *American T. & T. Co.*, 311 U. S. 223, 236 (1940).

of that State";[21] it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court.

Secondly, the difficulty of locating Common Pleas decisions is a matter of great practical significance. Litigants could find all the decisions on any given subject only by laboriously searching the judgment rolls in all of South Carolina's forty-six counties. To hold that federal courts must abide by Common Pleas decisions might well put a premium on the financial ability required for exhaustive screening of the judgment rolls or for the maintenance of private records. In cases where the parties could not afford such practices, the result would often be to make their rights dependent on chance; for every decision cited by counsel there might be a dozen adverse decisions outstanding but undiscovered.[22]

In affirming the decision below, we are deciding only that the Circuit Court of Appeals did not have to follow the decision of the Court of Common Pleas for Spartanburg County. We do not purport to determine the correctness of its ruling on the merits. Nor is our decision to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts. As indicated by the *Fidelity Union Trust Co.* case, other situations in other states may well call for a different result.

It may also be well to add that even if the Circuit Court of Appeals had been in error at the time of its decision, reversal of its judgment would not necessarily be appropriate in view of the second Common Pleas decision.[23]

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[21] *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108 (1945).

[22] In the present case, the Spartanburg decision came to light because petitioner had been a party to it, the Greenville decision because respondent's counsel had been a party to it.

[23] See *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538 (1941).

But we prefer to regard that second decision as an illustration of the perils of interpreting a Common Pleas decision as a definitive expression of "South Carolina law," not as a controlling factor in our decision.

Affirmed.